

*Francis Hargrave*

**THREE ARGUMENTS,**

*F. H.*

IN THE

**TWO CAUSES IN CHANCERY,**

ON THE

*LAST WILL of PETER THELLUSSON, Esq.*

BY

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ONE OF THE COUNSEL AGAINST THE WILL.

*The Report of this Case when in  
House of Lords 11. Ves. Jan. 112.*

L O N D O N.

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THREE ARGUMENTS

TWO CASES IN CHANCERY





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THE following THREE ARGUMENTS constitute the first article of a SECOND VOLUME of JURIDICAL ARGUMENTS and COLLECTIONS; and are here published separately for those, who may not chuse to purchase the whole of that volume.

IN the volume, to which the THREE ARGUMENTS belong, there is prefixed an ADVERTISEMENT, which relates to the Three Arguments here published separately; and therefore it is deemed proper to insert it here as an introduction to them.

### ADVERTISEMENT.

*THIS second volume of JURIDICAL ARGUMENTS is submitted by the author of them to publick notice, with very serious alarm, lest the most elaborate part of the contents, instead of obtaining favor from his readers, should attract their censure. When he resolved upon hazarding a second volume, which was not till close of the hearing of counsel in the chancery causes on the last will of the late Mr. Thellusson, some symptoms of temporary favourable effect, from delivery of the arguments of those who spoke against the will, raised his mind into the hope, that at least the first and most extensive article of this volume might prove interesting. But within these few days enough hath occurred to suppress his expectations in this respect; and to make him almost repentant, that he should be too far committed in the present publication to withhold it. Not only a solemn judgment hath been passed wholly over-ruling his Arguments in the Thellusson causes: but such circumstances have occurred, as may encourage a doubt, whether topicks, which*  
the



#### ADVERTISEMENT.

*the author deemed novel momentous and difficult, should have been so considered, or should have been amplified upon nearly in the extent in which they are treated in his three Arguments; and more especially, whether his history of the dry subject of EXECUTORY DEVISE should not have been reserved for future and more apposite application. Some consolations, however, present themselves to the author. Whatever may have been the impression with others, the noble lord, whose office it was to adjudge the causes, and whose extraordinary endowments eminently qualify him to fulfil the duties of that office, most certainly saw the case on the will as demanding full and solemn discussion. After hearing the leading counsel against the will of the late Mr. Thellusson, his Lordship interposed to postpone the proceedings, with an explicit declaration, that the case on the will struck him as being "of GREAT IMPORTANCE and SINGULAR NOVELTY;" and that he "thought, he "could not do better than call in the assistance of two judges." It should be remembered also, that his Lordship afterwards encreased the number of his assessors, by adding his honor the master of the rolls. Nor when the judgment was given in the causes, doth his Lordship appear to have disapproved the great scope of the arguments of any of the counsel against the will: for, notwithstanding the unfavorableness of the result to their side of the causes, his Lordship, with a polished sensibility, which at least operated as discountenancing all supposition of having trespassed upon the time of the court, observed, that he "was not surpris'd the case had been brought forward, and had called forth such "great exertion of learning and ingenuity." Under the latter part of this very handsome testimony, so far as it concerns the counsel against the will, the author of this volume feels it convenient to claim some shelter. Indeed he is sensible, that very little of the praise, thus generously bestowed, can be presumed to have been intended for himself. But small as his share may be, he trusts, that it will suffice to protect him against any ill effects from remarks of a different tendency. Fortunately also for the author, there is another circumstance*

*of*



ADVERTISEMENT.

*of a very consolatory description. It so happened, that the first impressions of the gentleman, who was leading counsel against the will, and whose very long experience and great profoundness in the law and equity of the country render him oracular in the profession, were unfavorable to those for whom he was engaged to plead; and in the outset of the business, this circumstance had casually transpired. But on close of the Arguments now published, this eminent lawyer took the opportunity, of most explicitly and repeatedly avowing to the gentlemen of the bar present and to others, that he was at length fully convinced the grand trust of the will in question was against law and ought to be declared invalid. It was manifest also in the earnest and masterly reply, he afterwards made, to the very able and learned arguments of the counsel for the will, that he compleated his professional exertions against it, under a strong influence from the conviction he had recently expressed out of court.*

F. H.

28. April 1799.



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## C O N T E N T S.

FIRST ARGUMENT. Page 1.

SECOND ARGUMENT. Page 23.

THIRD ARGUMENT. Page 126.

NOTE, that the Three Arguments (exclusive of the notes, some corrections of language, and some few passages, chiefly explanatory) are printed as they were actually delivered in Court.

## A P P E N D I X.

No. I. Extract from a CASE and ARGUMENT on the LAST WILL of the late PETER THELLUSSON, ESQUIRE, by the Author of the Three Arguments now printed. Page i.

No. II. Mr. MORGAN'S Calculation of the Accumulation under the Trusts of the late Mr. Thelluffon's Will. Page xxiii.



The Reader is requested to make the following Corrections.

In *running title* of pages 26, 28, 30, and 32, for FIRST ARGUMENT read SECOND ARGUMENT.

Page 30, line 7, for (*n*) read (*nn*); and in line 1 of the Note to same page, for (*n*) read (*nn*); and in the Margin, before *As to inheritance*, strike out the I.

115, last line of the text, for (*t*) read (*uu*); and in line 1 of the Note, for (*t*) read (*uu*).

117, line 4, for FIFTHLY read SIXTHLY; and line 12, for SIXTHLY read SEVENTHLY; and line 23, for *executive* read *executory*.

123, 21, after *happened* put a comma.

126, 5, after *charge* add *for excess of executory devise*.

129, 2, for *happened* read *happen*.

136, 1 of Note, after *requires* add a comma.

171, 18, for *stamp* read *save*.



# THREE ARGUMENTS

IN THE

## TWO CAUSES IN CHANCERY

ON THE

### *LAST WILL of PETER THELLUSSON, Esq.*

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O curas hominum ! O quantum est in rebus inane !

Quo divitias hæc per tormenta coactas ;  
Cum furor haud dubius, cum sit manifesta phrenesis.

Quæ reverentia legum,  
Quis metus, aut pudor est, unquam properantis avari ?

Omni  
Membrorum damno major dementia, quæ nec  
Noscit verba sua, uxoris nec vota, nec illos,  
Quos genuit, quos eduxit : nam codice sævo  
Hæredes vetat esse suos : bona tota feruntur  
Nummi ad congeriem. Tantum valet halitus auri !

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[THE three following ARGUMENTS were delivered, at Lincoln's-Inn Hall, the 5th, 6th, and 7th of December 1798, before the Right Honourable the LORD CHANCELLOR, assisted by the Right Honourable the MASTER OF THE ROLLS, the Honourable Mr. Justice BULLER, and the Honourable Mr. Justice LAWRENCE, in the causes, of THELLUSSON against WOODFORD, and WOODFORD against THELLUSSON.



It is apprehended, that enough of the facts is occasionally introduced into the Arguments, to make the force of them intelligible without the aid of a formal and regular statement. But least this should not be so, there is added an Appendix, with a view to putting the reader into full possession of the particulars of the case, which is the subject of the Arguments.]

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## FIRST ARGUMENT

DELIVERED

THE 5th OF DECEMBER 1798.

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MY LORD,

**A**S one of the counsel for the widow and children of the late Mr. Thelluffon, I have the honour of addressing this court on the present very important and interesting occasion.— In that character, it is my duty, to assist to the utmost, in inducing your Lordship's condemnation of a cruel and deceitful testamentary disposition: which aims, not only to overwhelm the most near, most affectionate, and most unoffending relatives, by an unnatural proscription, merely for the sake of an eccentric and outrageous vanity; but by an abuse of the art of will-making, to overreach the law of the country, and to pervert some of its most wise and convenient rules for regulating the enjoyment and transmission of property, into instruments of mischief to the whole community.

LITTLE



LITTLE accustomed to forensick business, and by nature quite barren of those higher qualifications, which that superior line of our profession demands, I have ever approached the temples of justice with fear and trembling. But though laboriously prepared for the present occasion, I never before presented myself under such a pressure of apprehensions: for I feel, that I am now one of those entrusted with the vindication of valuable private rights complicated with invaluable publick interests; and that I am pledged to take my full share in an argument, which, in point of subject, will, as I conceive, be found, to involve and risque the credit of the law, and the energies of the people of England, in the same event, as hangs over the individuals, whose claims are immediately at stake.

THERE are two causes before your Lordship.—One is on a bill brought by the widow of the late Mr. Thelluffon, and his three sons, and his three daughters, and the husbands of the two who are married. Of this cause the object is, to invalidate the trusts his last will creates of his general real estate and of his residuary personal fortune, and to substitute a resulting trust for his heir and next of kin; in other words, on the ground of vice and illegality in the nature of the trusts, to have a decree in equity for the grand bulk of the property real and personal, distributing it as if there was an intestacy.—The other cause is on a cross bill by the acting trustees and executors of the late Mr. Thelluffon, to substantiate the trusts of his will, and to direct the manner of carrying them into execution.

THESE two causes involve the right to property of immense value. Even in the present state of the publick funds, the property in question, exclusive of a landed estate of about £4000. a year, may be considered as above half a million sterling.



I AM very unwilling to trespass upon your Lordship's patience; which I know, by personal experience in a cause of great delicacy (a) heretofore adjudged by your Lordship against the party for whom I zealously argued, to be exemplary; and which, for that very quality, ought to be the less intruded upon. Coming also after the two very learned gentlemen, who have already applied their very powerful energies, to expose the illegality of the testamentary trusts in question, I dare not hope, that what I have to offer for the same purpose will be found, either to comprize any new topicks of reasoning, or very materially to conduce to the enforcement of those already advanced.

YET I know not, how to avoid being very full and particular in acquitting myself of my share of the argument.

THE immense value of the property at stake will, I trust, be some apology for me in this respect.

SOME apology also may arise from it's being known, that I come prepared to argue in these causes; after the fullest opportunity of considering the subject of them; and under an expectation from those who have reposed professional confidence in me, that I should submit to your Lordship the full result of my research and impression in their behalf.

BUT, as I have already hinted, I have somewhat more than all this, to excuse me to your Lordship, for unbofoming myself on the present occasion. In my view of the two causes, the unusual value of the property at stake, the painful anxiety of the

(a) The cause in Chancery here adverted to is Myddelton v. Lord Kenyon and others. It is reported in 2 Ves. Jun. 391. The author's two Arguments in that cause are in the volume of his Juridical Arguments and Collections published in 1797.



Thellusson family about the event, and their very strong claim to the best efforts of professional assistance, are almost secondary considerations. I feel myself urged on by incitements of a higher class. I ought to be, and I am, zealous for the interests of the widow and children of the late Mr. Thellusson, and extremely anxious to see them extricated by the justice of this court from the injurious effects of an unnatural will. But I am far more zealous and more anxious, for the honour of the law of England, and for the good of the community at large, than I can be for the interests of any particular family, however intrusted I may be professionally to assist, in guarding their particular rights, or in enforcing their particular pretensions. To the law of England I look up with confirmed reverence. It is not exempt from imperfections or superfluities. No human law is or can be so. But our law in its great outlines I consider as a combination of the wisest policies. Those theorists among us, who endeavour to create disesteem of our law, but who, I trust, are few, would do better, if they were grateful for the extraordinary protection it affords to all classes of society. I lament, when I see the least approach to a depreciation of the law of England. I therefore lament, when I hear its greatest luminaries in former times, such as Lord Coke and Lord Hale, adverted to otherwise than with veneration. To run down the characters of such great men of our profession is to undermine the law of England: for their adjudications and their writings are some of its chief depositaries. To throw a veil over the infirmities of such persons, is far more honourable, than subsisting on the loan of their talents and wisdom and at the same time declaiming against their characters. But being thus anxious for the law of England, I cannot look to the nature of these causes on the will of the late Mr. Thellusson, without feeling an apprehension, that if they should be adjudged in fa-  
vour



vour of the will, some advantage may be gained by those, who wish to depreciate our law, and to encourage a difesteem of it. Certainly the law of England abounds with excellent policies. But I have ever understood, that one of those admired policies is it's wisdom, in regulating the entail and transmissiion of property; and in steering between the extreme of enduring perpetuity of entail and the extreme of enduring no entail at all. The policy of our system in this respect is more especially to be seen in our doctrine of fines and recoveries, in our doctrine of remainders and reversions, in our doctrine of uses and trusts, and in our doctrine of executory devise. It is one of the aims of all these doctrines, to set a just and rational boundary to entails of every description; and to set such a boundary, as may conciliate private accommodation with public good. But unless I greatly mistake the causes now before your Lordship, it will depend upon the decision of them,—whether all the wisdom, so long exerted for that important purpose, is not liable to be baffled by three or four lines from the most ordinary conveyancer:—and whether a fabrick, which our most enlightened judges have been two centuries in raising, is not so feebly constituted, as to be at the mercy of the pen of every conveyancing draughtsman throughout the kingdom:—and whether also, in consequence of this imperfection, it is not ~~also~~ at last discoverable, that by the law of England, there is *a mode of settlement, by which it is possible with CERTAINTY, not only to make an entail completely unbarrable for almost a century and an half; but during the whole of that space to render property of every species and in every extent, unenjoyable, unexpendible, and unusable.*

I BEG leave, therefore, to repeat, that the subject of the contest on the present occasion, is much more than the cause of the late Mr. Thellusson's family against his testamentary dispositions.



sitions.—It is the cause of the law of England, against an attempt, to defraud it's policy, to abuse it's indulgence, to degrade it's character, and to charge a long series of our most admired judges with imbecillity.—It is the cause of the judicatures, nay of the people of England, against an attempt to foist upon them such a monstrous precedent of *trust of accumulation grafted upon entail by executory devise*, as, being taken full advantage of, might hereafter gradually paralyze the best faculties of the country, by converting all the property of the kingdom from a subsistence and defence for the living into a mere gratification for avarice in the tomb.—In other words it is the cause of the kingdom against an *experiment*, to impose upon English judicature, what, as I insist, was never yet endured by any law, in any country, or at any time; and *under the shelter of a policy, emanating from an exercise of judicial discretion for the sake of general convenience, to make judicature itself accessory to a most extravagant public mischief.*

IF such be the nature of these causes, there is a strong demand upon this court, to exert it's utmost vigilance, it's utmost wisdom, and it's utmost fortitude; least, by the working of others under the surface of executory devise, the boundary of that mode of entail should be so erased, as to let in most of the mischiefs such boundary was constituted to prevent, with the addition of mischiefs still more serious. The judges of former times had to contend, with ingenious schemes of extending entails beyond the usual time for suffering common recoveries. *Perpetuity of entail* assumed various forms for that purpose. In the reigns of Elizabeth and James the first, the form was *proviso of forfeiture* for cesser of estate in case of any attempt to bar entail by recovery or otherwise: and how much exertion was required to suppress this mode of defrauding the law of  
common



common recoveries, appears in Lord Coke's report of the three great cases of Corbet (*b*), Mildmay (*c*), and Portington (*d*). Another form assumed was *executory devise*, which from its nature is not within the reach either of fine or recovery: and to prescribe a boundary to the contingency on which this mode of entail depends, and to foil those attempting to exceed that boundary, the courts of Westminster Hall have been almost continually resorted to for about two centuries. Another form for perpetuities has been *executory trust*, directing estates for life to *unborn* children to be so constituted, as to make them tenants for life and to let in their issue to the inheritance as purchasers: and this enterprize was crushed by Lord Chancellor Cowper soon after the death of Queen Anne (*e*), in the case of Humberston and Humberston; that great judge of equity refusing to make trust the handmaid for extending the unbarrableness of entail, and to admit the substance of inheritance under the veil of successive lesser estates. A further form of eluding the policy against perpetuities was a *power of revocation*; that is, under a trust to revoke estates of inheritance to unborn children the moment they were born, and to substitute strict settlement: and this shift to accomplish perpetuity did not receive its final condemnation till the case on the will of John Duke of Marlborough at the beginning of the present reign (*f*). But in all these instances our courts have had only to counteract schemes for unduly prolonging entails. Yet even this was found to be a work of difficulty. Mary Portington's case, as Lord Coke informs us, was argued in the Common Pleas more than seven times. Most of the other cases I have adverted to, were also elaborately considered. But, in the

(*b*) 1 Co. 77.

(*c*) 1 Co. 175.

(*d*) 10 Co. 35.

(*e*) 1 Wms. 332.

(*f*) Case of Lord Charles Spencer and others v. the present Duke of Marlborough in Dom. Proc. Feb. 1763. in 5 Bro. Cas. in Parl. 592.



present instance, your Lordship has to combat, with a *scheme involving to a vast extent both perpetuity of entail and perpetuity of accumulation*: and you have to defend the country, against *stopping the use of property*, as well as against *stopping the power of alienating it*. Convinced also though I am, that the monstrous enterprize of trust, the fate of which it is for your Lordship in these causes to decide, falls within clear principles of judicial condemnation; yet I am not blind to the difficulties in your Lordship's way. You have to detect and overcome encroachments upon the boundary of executory devise in new forms; so contrived in some respects, as to have the specious appearance of literal conformity to the very rule meant to be subverted; and consequently so contrived, as to secure a very strong prejudice, that it is a kind of abuse only restrainable and corrigible by legislative interposition. You have also to *prescribe a boundary, where hitherto our courts have not been provoked regularly to fix one*; where hitherto the most unfeeling avarice has not so tampered with trust of accumulation, as to demand from this court an investigation of limits. The present case thus calling for the defence of the established rule of executory devise against new shifts to elude it's boundary, and at the same time calling for a boundary to trust of accumulation, I feel, that there is a demand for the best faculties and the best exertions in the performance of judicial duty: and as well for the sake of the country at large, as for the sake of the individuals for whom I am one of the counsel, I am heartily glad, that it devolves upon your Lordship to adjudge,—whether such extended executory devises and such extravagant trusts of accumulation, as the will of Mr. Thelluffon attempts to incorporate, are not mischiefs against the reason and policy of the law of England;—and whether his compound of excessive entail and excessive accumulation is not equally controulable by a firm exercise of judicial

C



dicial wisdom and judicial power, with the lesser mischief of excess of entail only.

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THE great question in the two causes arises on the validity of the trusts, which the testator Mr. Thelluffon has annexed,—to the devise in fee of his great landed property in Yorkshire and his real estate elsewhere, except his house and estate at Plaistow in Kent and his house in Philpot Lane London,—and to the bequest of his immense residuary personal estate.

It is, whether the trusts, to which he has devoted a landed property of about £4000. a year, and about half a million in personal estate,—in disinherison of his eldest son and heir,—and in exclusion of the widow and all the existing issue of him the testator,—and in order to accumulate three vast landed fortunes for three future male descendants of his blood and name in at least the second, and most probably the third or fourth, or even more remote generation, and in case of there being only one such male descendant at the time fixed, then to consolidate the three fortunes into one huge mass for his single use ;—are fit to be executed by an English court of Equity.

In other language the question is, whether from some vice in the extent of the directed accumulation, or from some vice in the constitution of the beneficial interests limited to commence when the accumulation is appointed to cease, all the trusts created by the late Mr. Thelluffon of the chief bulk of his fortune ought not to be condemned as void and inoperative.

ON



ON the consequences of an absolute failure of the trusts, I submit, that there cannot be any doubt: for if they are void, there must, I presume, be a resulting trust, that is, for his eldest son and heir as to the *real* estate, and for his widow and all the children as his next of kin as to the *personalty*.

THE short general point then is, whether the trusts of accumulation and those appointed to commence when the accumulation is limited to determine are or are not valid.

THE odiousness of the trusts cannot be denied. In this respect, and as to the grand bulk of his vast fortune, the will of the late Mr. Thellusson is a complication of proscriptive cruelty towards all parts of his numerous existing family.

HIS three sons had married, with his fullest approbation, to ladies, to whom he appeared almost as devoted as if they had been his own children.

THE three sons were upon the most affectionate terms with him, and so continued to his death. They were living on a liberal scale proportioned to their situation and natural expectancies, that is,—as persons, who had received some fortune from their father, and some fortune through the ladies to whom they were married;—as persons, who had succeeded their father in the very great mercantile business in which his vast fortune was acquired;—as persons, who, seemingly to the gratification of his pride, had obtained seats in the British House of Commons;—as persons, who saw their father already possessed of about two-thirds of a million sterling, and likely to live long enough to augment this vast fortune by very great accumulations;—and as persons, who, from his external kindness to-



wards them, and from his professions, had every reason to confide in receiving at his death their due proportions of his immense wealth. But, by the trusts created of the great bulk of his fortune, the testator excludes these his three sons wholly and absolutely. Nay, he sharpens this extreme unkindness or rather barbarous injustice,—with the insulting consolation of his having provided enough for them to secure comfort ;—with an injurious insinuation of their being too fond of shew ;—and with a sanctified lesson of morality against vanity and ostentation, at the very moment he was wantonly sacrificing at their altar above half a million of property, to the disinherison and grief of his unoffending issue. What also appears from the admission in the pleadings in the two causes, and, if it was necessary, might be regularly proved, adds to the cruelty to the three sons, is, that upon their marriages, he made verbal promises to the families into which they married, to make further provisions for the sons much exceeding the pittances his will gives to them ; and that according to his declaration to some relations and friends of the family made but recently before his death, his eldest son and his eldest grandson were to have his great Brodsworth estate, and he the testator wanted to purchase two other great estates for his two other younger sons.

Not content with thus insultingly disappointing his three sons, the testator involves in the same fate all their existing issue ; the trusts being so constituted, as to make it impossible, if the will prevails, that any male issue of his three sons born in the testator's lifetime, *or born within due time after his death* [in whatever sense those words of the testator's will are to be understood] or any female issue of the three sons born in the testator's lifetime, should have the least benefit from the immense property in question, or its accumulations. Nay, it is at least



least dubious, whether this exclusion was not meant to reach even future male issue of the three sons to a certain extent. The present result of this unfeeling part of the arrangement is an absolute exclusion of six grandsons of the testator and four granddaughters. The grandsons are sons of the testator's eldest son living at the date of the will, and two twin sons born within nine months after the decease of the testator, and a son of the third and youngest son of the testator born a few months before his death. The granddaughters are two daughters of the testator's eldest son, and two daughters of the testator's second son. Nor is this proscription of the testator's grandchildren a little aggravated by other circumstances of the case. For the seven grandchildren, who were born before his last will, he ever shewed the most affectionate kindness. To the eldest of them, the one next in succession to him after his eldest son the heir apparent of the family, this exclusion is scarce even credible. It appears, that the testator, only ten days before his death, sent for his eldest son; desired him to give a private tutor to the eldest grandson, observed upon his promising talents, and prophesied his becoming a great man in this country. The testator emphatically added, I HAVE TAKEN CARE OF HIM. According to the will, this care consisted of a French life annuity of 800 livres in the French funds; which the will describes as not having been paid for many years; which there is no prospect of ever receiving; and which, if it could be received, would be scarce worth having.

THE three daughters of the testator are not treated with more lenity in the trusts in question. On the contrary, they and their issue are excluded without the least reserve or exception. Not even their male issue are spared. Yet if his three sons and their existing issue were to be proscribed, it was natural, that the daughters



daughters and their issue should be looked to. He had married his eldest daughter to a gentleman born of a noble family (g) and of great personal merit. The vast size of the testator's fortune, and his professed kindness towards his eldest daughter and her husband being considered, they might reasonably have expected a great increase of provision from him, even though he had not thus excluded his sons and grandchildren. Independently also of the same exclusion, the two other daughters, who were become marriageable, and who always appeared to have a proper share of his parental affection, might for like reasons have been justified in expecting a much greater fortune than he has thought fit to provide for them by his will. How much more then might these three daughters have expected to be considered by the testator, in the disposition of his immense fortune, if the bulk of it was to be denied to their brothers and the children of the brothers ! But the testator's natural affections were too much under the dominion of his vain and avaricious passions, to listen to such a consideration of his daughters. Instead of being more favourable to them, because his harshness to their brothers and the children of their brothers, gave the opportunity, he is more harsh to the daughters ; his will not even admitting to the succession to his general fortune, either them, or their issue of any kind or at any distance of time.

IF the trusts are viewed with a reference to the testator's wife, to whom he ever appeared most affectionately attached, and of whose merits even the dispositions of his will in other respects bear such ample testimony, the odiousness of the trusts is still further increased.—As the testator's children and grandchildren were thus proscribed, it might have been expected, that

(g) The Honourable Augustus Phipps.

his



his wife would have been highly considered in the trusts of his vast residuary estate, and would have become a principal object of them. But so to have shaped the trusts, might finally in great measure have disappointed his proscription of his children and grandchildren; for her maternal affection would naturally have been exerted to repeal the effect of the testator's cruel dispositions. Even therefore the wife of the testator is wholly excluded from the possibility of benefit under the trusts in question.

It is a still further aggravation of this exclusion, by the testator, of his wife, children, and grandchildren, and even of his issue in the third generation, from the chief mass of his fortune, that the sacrifice of them is made merely to indulge the outrageous vanity of erecting three landed fortunes of a size unheard of in England for three future male descendants of his three sons; and that the trusts are so contrived, as to make it impossible, either that his sons or his existing grandsons should even have the consolation of knowing, which of their male descendants are to be the happy possessors of the accumulated estates. It is the nature of the trusts to continue the accumulation, till all the sons and existing grandsons are dead, and in the mean time to make the future proprietors of the estate quite uncertain.

Thus in every point of view, with reference to the family of the testator, the trusts appear to be of the most hateful description. By them, the testator not only disinherits his existing family; but he disinherits them from motives of a vicious cast. His wife, children, and grandchildren, are excluded from the bulk of his fortune,—not because they had offended him; not because they were not dear to him; not because they did not deserve



deserve to be so; not because others were more dear to him: but because he thought fit to yield himself up a slave to the avaricious vanity of establishing a long accumulation after his death, and of so constituting for remote male descendants fortunes of a size as yet unknown in Great Britain. Anger and resentment against his family could not be the sources of his ungenerous and unfeeling dispositions: for he and his family were all harmony and affection, and so continued to the last moment of his life. The real incentives to the will were avarice and vanity. *Inde faces ardent.* Those passions were the real source. So traced, the trusts in question are more than a disinherison of the family of the testator, without so much as the colour of provocation from them; are more than a cruel disappointment of expectations encouraged by his own fatherly kindness and professions to the very moment of his death; are more than a breach of his duties and promises to his wife and issue, without the semblance of apology of any kind for him. I say that his will is not only all this accumulation of the harshest injustice to his existing family. It is all this,—with the aggravation of his thus sacrificing the most valuable interests of those, who should have been, and appear to have been, the most dear to him, wholly in order to gratify the avarice of posthumous accumulation, and the vanity of posthumous aggrandizement of the Thelluffon name in the persons of future and remote male descendants;—with the further aggravation of endeavouring to palliate his cruel disposition by satirical insinuations against his three sons, at the same time tending to injure their credit as merchants, and in some degree to detract from the esteem of them as men;—and with the still further aggravation of endeavouring to win both parliament and judicature into an approbation of his ungenerous dispositions, by an  
affected



affected zeal to pay off the national debt, and by the hypocritical offer of a remote and improbable contingency in his residuary fortune to effectuate such a public good.

BUT the testamentary trusts, the odious nature of which it is my duty as one of the counsel against the will to expose, are not merely injurious to the widow, children, and grandchildren, of the late Mr. Thellusson; are not merely in breach of his duty and professions as the father of a family. They are not merely vicious in a moral sense. They are also injurious politically. They are against the interest of the commonwealth, against public good.—Under shelter of the testamentary power, it is the aim of the testator to suspend both succession to and enjoyment of much above half a million sterling, till it shall have accumulated into landed property of the value of millions, nay, of tens of millions. On this topic I shall have occasion to enlarge in a subsequent part of this argument. Here it may be sufficient to say of such a precedent of accumulation, that trusts constituted for such a purpose are at least of a tendency highly dangerous to the publick interest.

It may at first seem, as if thus minutely animadverting upon the trusts in question was inveighing against them with more particularity and more harshness, than the real argument of the case requires.

BUT, impressed as I am, with the present case, it appears of importance to those, who claim to annul the trusts, that the odious nature and pernicious tendency of them should be fully understood, even in the outset of the argument. Notwithstanding the extreme harshness of the trusts towards the existing family of the late Mr. Thellusson, it is very far from being their

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with



wish to disturb his memory further than justice to themselves extorts. They are too mindful of his affectionate kindness whilst he was living, except in his grand testamentary disposition, and too mindful also of the benefits they derive from him under the very will they complain of, to wish to see his memory unnecessarily wounded. Nor if they had such a wish, would it become their counsel to gratify it. But in contesting the trusts of his general residuary estate, his widow, sons, and daughters, have for themselves and the grandchildren of the testator, much above half a million of property at stake; and it is not to be expected, that they, or at least those acting to sustain their interests, should, in a case of such vast value, make a sacrifice of any real advantage in the argument against the will, from mere delicacy towards the memory of one, whose testamentary disposition of his principal fortune is so exceedingly cruel to his family. If his memory could be spared, without the most serious injury to those who contest the chief trusts of his will, they would rejoice at the opportunity; and would reserve their griefs and injuries for private lamentation. But it so happens, that the case against the will is of such a nature, as to render the argument of *favour* and *disfavour* to it, of some importance in the contest. Consequently the odiousness of the will is a topick against it, which cannot be conveniently spared. We trust indeed, that there is a sufficiency of objection to the legality of the trusts, without aid from any topick of favour to the family of the testator or of disfavour to the trusts of his will. Yet it must be confessed, that the points raisable against those trusts are not without nicety and difficulty. Both in construing the intention of the trusts, and in applying the principles by which that intention is controulable, the argument may occasionally be somewhat influenced by such topicks of favour or disfavour. Nay, it is possible, that in some positions of the argument,

favour



favour or disfavour towards the trusts may turn the balance for or against the validity of them. — If the words constituting the trusts shall be found to be so ambiguous and equivocal, that construed favourably, they will be within the boundary of the law of executory devises, but construed unfavourably they will exceed that boundary, the decision of a Court may be ruled by the quality of the trusts. Were they meritorious, it might be a duty to understand the words restrictively, and so to declare the trusts legal. But the trusts being odious, it may be justifiable to understand the words largely, and so to condemn the trusts as against law. — Again, if the trusts constituted shall be found of such a nature, that it shall depend on the discretion of a Court of Equity to decide, whether they are fit or proper to be assisted by the exercise of equitable jurisdiction, were the trusts meritorious, it might induce going the utmost length in favour of them. But on the other hand, if the trusts shall appear to be of an odious description morally, and of a dangerous tendency politically, a Court of Equity may feel it a duty to do all in its power towards disappointing them; may feel itself called upon to administer its discretion by declaring the trusts unworthy of being performed. — So again, if it shall be found, that in constituting the beneficial interests appointed to take effect when the trust of accumulation is permitted to cease, the will is so obscure in the language, as to make it very doubtful, who are meant to take primarily, and what kind of succession is meant to be constituted, were the object of the testator just and becoming, it may be the duty of a Court to strain every nerve to explore the intention; and, for the sake of facilitating its execution, to risque adopting a construction however dubious. But if the object of the trusts shall be found nearly as odious and dangerous in their tendency, as I understand and state them to be, it may be justifiable in a Court to decline construing obscurity into intelligibility, to decline making sense of nonsense, to decline making



certainty of uncertainty; and thus it may become the duty of a Court to condemn the trusts, as being too vague and obscure to be executed.

IN these views of the case, then, the odiousness of the trusts in question may have great weight in the argument against them. Their odiousness may not only inspire judicature with a desire or rather an anxiety to disappoint them; but may actually afford the opportunity. Therefore in arguing to subvert the great trust of the late Mr. Thelluffon's will, I submit that the cruelty and injustice of his chief testamentary disposition should never be lost sight of. Nor is it new in our courts of equity, or even in our courts of law, to resort to the unmeritoriousness of testamentary dispositions, in order to influence the interpretation of them. Both jurisdictions are accustomed to look to meritoriousness and unmeritoriousness in the construction of instruments of every kind, as well as in various other respects (*b*).

HOWEVER it cannot be contended, that the mere odiousness of the trusts in question will suffice to invalidate them. Such is the extent of the testamentary power with us in England over property both real and personal, that notwithstanding the greatest harshness, or even cruelty, in the dispositions of a will towards the family of a testator, the will may be good in law and irrelievable in equity. Amongst the Romans a will might

(*b*) For FAVOR;—to *heir*, see a series of cases at law and in equity in Viner's Abridgment *Heir* R. S. T. & U. *Executors*—Z. 3. & *Portions* I. Comyns's Digest *Devise* N. 22. and title *Chancery* 3. P. 3. 1. Equity Cases Abridged *Heir* C. D. & E. & 2. Eq. Caf. Abr. same title A.—to *Wife and Children* and *grandchildren*, see Com. Dig. *Chancery* E. 1. Eq. Caf. Abr. 202. *Grounds of Law and Eq.* 66.—to *Charities* see Vin. Abr. *Charitable Uses* E.—and to *Creditors* see Com. Dig. 3 A. 3. Vin. Abr. *Creditor & Debtor* A.



be invalidated for undutifulness to near relations, especially to children; and if they were disinherited or passed over without just cause, there was a remedy against the will by the *querela testamenti inofficiosi*, that is, a complaint of the will for being made against duty, against moral obligation, against the dictates of nature, *contra officium pietatis, contra naturale officium* (i). When and how this relief to disinherited children and other near relations originated, whether from a benevolent subtleness of interpretation in considering such unnatural dispositions as proofs of insanity, or from positive constitutions, is a disputed point amongst civilians. But certainly it was settled law in the time of the Emperor Justinian, and long before, that a will might be impeached for undutifulness. Certainly also the testamentary power became circumscribed in like manner in some countries of modern (k) Europe. It was so in some provinces of (l) France. But it is not so with us in England. By our law, the testamentary power is in this respect unqualified (m). Our law agrees with the twelve tables, in which according to the extract in Justinian's Institutions (n), the language was, UTI LEGASSIT SUÆ REI, ITA JUS ESTO. Therefore unless there is something wrong in the trusts in question beyond the moral injustice of them, to the family of the late Mr. Thellusson; unless the public inconvenience of them be of such a description as to be contradicted by some known policy of our law, or be of such a magnitude as to render them

(i) See Inst. lib. 2. tit. 17. 18. & 19. & Heinecc. Syntagm. Huber Prælect. and Vinn. on those titles.

(k) Hoppii Commentatio ad Instit. lib. 2. tit. 18.

(l) Traduct. des Institutes de Justinien par M. de Ferriere liv. 2. titr. 18. in the Notes.

(m) See Swinb. part 5. f. 1. Cowelli Institutiones Jur. Anglican. lib. 2. tit. 19. Co. Litt. 13th ed. 176. b. note 6.

(n) Instit. lib. 2. tit. 22. princip.



unfit for execution by our courts of equity, the trusts, however they may be reprobated, however those they exclude may be compassionated, must prevail in our Courts of Justice ; and in that view nothing short of legislative interposition can annul them.

THE case then comes to this. Can it be shewn, that the trusts militate with any principle, rule, or policy, of the law of England ; or that they are of such a nature, as to be unfit for execution by an English Court of Equity, or that they are otherwise unexecutable ?

THESE, I agree, are the proper subjects of enquiry and investigation, and I enter upon the argument accordingly.

So looking to the case, I accuse the trusts of *infringing the rule introduced into our law to circumscribe executory devises*, nay, of so infringing in several points, on any one of which, the charge, if proved, is, I contend, sufficient to nullify the trusts in question.

I ALSO accuse the trusts of *excess of accumulation* ; and in that respect, of *being so grossly against public good, and so grossly improper, exclusive of the limits prescribed to executory devise, as to justify a Court of Equity in condemning them*, or rather to require such a condemnation.

FURTHER I impute to the trusts, that they are *so vague, so obscure, and so uncertain, in the description of the primary beneficial devisees and legatees, as to be rejectable on the ground of unintelligibility and impracticableness*.

SUCH



SUCH are the *three points of view*, therefore, in which I propose to examine the trusts, to put them to a test, and to impeach their validity.

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## SECOND DAY'S ARGUMENT.

DELIVERED

THE 7th OF DECEMBER, 1798.

MY LORD,

ANCIENTLY I had obligations to your Lordship for personal attentions; which were of no slight importance to me in the younger part of life, when all attentions, from one of your Lordship's description, were peculiarly gratifying and valuable. Of those attentions I should have been proud, even in times the most prosperous; such as I never reached, nor am ever likely to gain an approach to. It was my ill fortune, to see those attentions intermitted, from causes: which, neither on your part proved pride, enmity, inconstancy, or insensibility; nor on mine were, for a moment, even in the least degree incompatible with high respect, great admiration, or sincere gratitude. My own feelings have ever testified for me in this point. Your Lordship's conduct to me on several occasions heretofore has convinced me, that, however unpropitious some appearances might be, substantially your disposition towards me, though checked by circumstances, was most honourably just, nay, was even liberal. But had all other proofs been wanting,



wanting, this would have sufficiently appeared from your Lordship's generous indulgence to me yesterday, at a moment highly distressing to one : who, though a veteran in the study of English law, and in that retired practice, which is only to be seen in the gloomy solitude, of chamber-consultation, and of chamber-application to juridical business and juridical studies, is not only a novitiate in the forums of justice ; but a novitiate, the most nervous, the most unprotected, and a novitiate so described, with the further drawback of being in the wane of a life never fortunate, sometimes imminently the reverse. Nor, I am persuaded, will any liberal person of the same honourable profession with myself murmur, at such an occasional indulgence to one of my age and under my circumstances, as the option your Lordship so kindly gave me yesterday. I mean the option of wholly postponing my long argument, in causes, in point of subject uncommonly novel, arduous, and important, to a second day, or of dividing my argument between two days.

THE boon, which I thus acknowledge, and which I eagerly took advantage of, was a great assistance to me ; a great relief to my apprehensions. I trust also, that it will at the same time be found an arrangement, not ill calculated to promote the important purpose of more deliberately at least exploring,—what is the real justice of the two great causes now in judgment before your Lordship ;—and whether in deciding on the will of the late Mr. Thelluffon, the honour of the law of England, and the interests of the country, are really implicated in the extensive way I yesterday took the liberty of representing to your Lordship. Had it not been for the considerate attention to my situation in these causes, I know not, how without danger of disgusting your Lordship and the reverend judges who are assessors to you,  
or



or even without disgust to myself, I could have discharged my professional duty, nearly in the full extent of the matter I have gathered and digested for the occasion. If my labours had been the most perfect secret to all but myself, it was not to be supposed, that the science, acuteness, learning, zeal, and eloquence, of the two learned gentlemen I have the honour of following, would have left the great subject of *executory devise*, and the great subject of *trust of accumulation*, which are the chief topicks of these causes, with much ground untrodden. But it so happens, that to serve the interests of the family, for which I am one of the counsel, and to shorten the labour of superior persons, my impressions were communicated for common use. Had I therefore been pressed yesterday, to follow my two learned leaders in these causes, with any thing beyond mere introduction, I should have been in a very distressed situation. My operose details, after their spirited compressions of the same topicks, would have been scarce endurable, even by your Lordship's patience, highly polished and disciplined as it is. So instantaneous a succession, of the slow productions of the lamp, to the quick flashes of forensick eloquence, might have been like a great and long fast succeeding a short but luxurious feast. But the interval, which has been allowed, may lessen the disadvantage I am under, from exhibiting at length, what has been already stated to the Court, not only more briefly, more agreeably, and more impressively, but with accessions of more value than any materials originating from me.

It would indeed be of little consequence, if there was little more to be derived from the interval I mention, than my personal accommodation. But I flatter myself, that much more important effects may be expected from the ar-

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rangement



rangement your Lordship thus indulged to myself. Though, as I have already hinted to your Lordship, I am individually the most strongly impressed with the untenableness of the will of the late Mr. Thellusson, both from *excess of executory devise*, and from *excess of accumulation*; and though I am even very seriously struck with the objection to his beneficial trusts for *uncertainty of description*; yet I am aware of the difficulties and delicacies, which belong to the case. More particularly I am aware of a strong prejudice, which has somehow or other almost unaccountably reached some of the most respectable members of our profession, and may perhaps have ascended still higher, that the calamitous publick mischiefs, which are confessedly incident to the establishment of such a precedent of *artificial extension of executory devise and trust of accumulation combined*, as Mr. Thellusson's will comprizes, can only be effectually obviated by an act of parliament. I am aware also, that this prejudice is very much assisted in one very important branch of the present case, by the great authority of a recent but unrepealed certificate of the King's Bench to your Lordship in the case of Long and Blackall. To encounter prejudice thus powerfully in some degree assisted; and to subdue the difficulties which otherwise belong to the present case; a full expression of arguments and a full reference to cases and authorities, however tiresome and unpleasant, may be not only useful in a subsidiary way, but even necessary. The two learned advocates, whom I have the honour of following, having inspected the rough materials I was able to furnish by digging at the mine, have separated the finer and better parts of the ore I drew forth for their service; and by a proper application of them, have exhibited an impressive though short picture. But fine pictures are sometimes composed, with colours very splendid, but very transient and



and fading; and it is for those, to whom the appreciation of the value of the picture is entrusted, to examine the quality of the colours, and to require evidence of their firmness. Accordingly to enable such an examination in the present instance, it may be expected, that I should actually produce enough of the rough materials extracted by me for the service of the present case, to shew, that the picture, Mr. Mansfield and Mr. Grant have so ably drawn, is both a genuine and a lasting portrait. Indeed I feel this to be a justice more especially due to the family, for which I am counsel; because I have reason to believe, that those two learned gentlemen, from a generous sensibility towards me, have actually forborn to enlarge upon many topicks, for which they knew me to be copiously and laboriously prepared. Under such circumstances, if I was to keep back what I have extracted and digested, it might injure the cause it is both my duty and my anxious wish to sustain.

NOTWITHSTANDING therefore the masterly anticipation of the arguments, which I have prepared to offer to your Lordship in the great points of these causes, I shall venture to address you and the reverend Judges by whom you are assisted, with the same fullness, as if I was not under the disadvantage of any anticipation whatever.

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THE FIRST ground, upon which I have undertaken to argue against the trusts in question, namely, their *infringement of the boundary of executory devise*, depends upon the policy, by which our law limits and regulates executory de-

FIRST, general ground against the trusts, namely, *infringement of the boundary of executory devise.*



vifes, and springing uses and executory trusts of a fimilar nature.

IF the grand trusts of the late Mr. Thelluffon's will are fupportable, it must be, because they are sheltered under the rule of entail by executory devise and by trust of the same nature: for, except under that protection, there is no possibility of enforcing the trusts.

IN arguing the present case, therefore, it may be very material to know, when, and how, and by what authority, and under what qualifications, the doctrine of executory devise became incorporated into our system of law and equity.

ACCORDINGLY, with your Lordship's leave, I shall here attempt somewhat in that way. Such a research, indeed, is not only dry and difficult; but extensive. To make it interesting will, I fear, be much beyond my strength. But it is within my power to restrain myself in the enquiry: and with that view, I shall endeavour to be as short, as the purpose of the present case in my impression of it shall allow.

Origin and  
progress of  
Executory  
Devise.

EXECUTORY devises have chiefly sprung up since the statute of uses in the 27th of Henry the Eighth, and the statutes of the 32d and 34th of the same reign, enabling the devise of lands *at the free will and pleasure* of the owner. Some glimpse, however, there is of executory devise in much earlier times; and it is possible, that under the custom of devising land, as it prevailed in London and other places, something of the kind



kind might be occasionally at least attempted. Accordingly it has been asserted by judges of high authority, that executory devises, determining the fee in one person on a contingency, and raising the fee up in another, have always in some respect prevailed. This assertion, which came from the bench in *Pell v. Brown*, in the 18th of James the First, as appears by Judge Coke's report in that case, might be true in a small degree, under the power of devising land by custom. In favor of the assertion so restrictively understood, our Year-books furnish some little evidence. Gowdchep's case in 49. Edw. 3. fol. 16. which is of a devise, under the custom of London, that executors should sell land to make distribution for the soul of the testator, seems to be of that description; the fee till sale descending to the heir, but afterwards passing to the vendee. The case put in the Year-book of 11. Hen. 6. fol. 13. b. of a devise of land in London under the custom, that the executors should sell to pay debts; and the case put in the same Year-book of a devise under the power by custom to issue *en ventre sa mere*, are all instances. But even the industry of Lord Coke's time was not sufficient to glean more than these few examples of executory devise of land in the times previous to the reign of Henry the Eighth; and it may be doubted, whether these precedents alone should be deemed precedents sufficient to prove the law, even as to the power of devising by custom: and even though executory devise should be proved to have thus existed in a small degree, it should be considered, that in very ancient times the tendency to perpetuity, which is a grand objection to unlimited executory devise, and which, after the establishment of common recoveries, became so important a consideration, was not then of so much consequence. Certainly also the undoubted rule of the common law against creating a freehold *de futuro*, as it is stated in Barwick's

*Pell v. Brown*

*Gowdchep's Case  
Edw. 3.*



Barwick's case, 5. Co. 94. b. and is in part ingeniously accounted for in the introduction to the Manuscript treatise by Lord Chief Baron Gilbert on Remainders, which I furnished for the new edition of Bacon's Abridgment, made it impossible to create such executory interests in the freehold and inheritance of land, by grant or any common law conveyance (<sup>n</sup>): and so Lord Coke observes in Matthew Manning's case, in the eighth report 95.

To make the inquiry concerning the origin and progress of executory devise more simple and intelligible, I will consider the subject under three distinct heads; namely, first as to *inheritance*, next as to *terms of years*, and then as to *chattels personal*.

*Inheritance*  
*Terms of years*  
*Chattels personal*

As to Inheritance.

FOR many years after the beginning of the sixteenth century, executory devises of the *inheritance* seem to have been little known, and as little sanctioned. According to the case of the prior and convent of St. Bartholomew West Smithfield, which is in Dyer fol. 33. a. pl. 12. and arose on an executory devise of the inheritance of land under the custom of London, the judges Fitzherbert and Baldwin, in the 28th. and 29th. of Henry the eighth, held it not allowable to limit a fee upon a fee. Indeed, as that case was, the contingency for the rising of the secondary fee was such, as might have happened at any time however distant. Therefore, even upon the doctrine

(<sup>n</sup>) 5. Bac. Abridg. Ed. by Mr. Gwillim, 716. The reason assigned is the tendency of a grant of the freehold in futuro, to make the tenant of the freehold in the mean time regardless of the services due to the Lord. But this seems only a subsidiary reason; for it is to be remembered, that the rising up of future and executory estates of freehold, on the happening of the particular contingency, would not have been consistent, with the solemnity and notoriety required by our law for the passing of freehold and inheritance, and would have materially affected the use of real actions.



of executory devises, as afterwards received and now established under restriction, the executory devise could not have been supported. But Lord Chief Justice Vaughan, in his report of the case of Sheldon and Gardiner, which was adjudged in the 23d of Charles the second, infers from the before mentioned case in Dyer of the 28th. and 29th. of Hen. 8. that the clear opinion of the judges Fitzherbert and Baldwin, whom Lord Vaughan styles the greatest lawyers of the age, was against executory devises as a thing unknown to our law; and most probably, notwithstanding the cases I have before cited from the year books of 49. Edw. 3. & 11. Hen. 6. this might be the real state of the matter. However it may be collected from the case in Dyer fol. 124. a. pl. 38. that executory devises of the inheritance became in some degree countenanced in the reign of Philip and Mary; for such a devise, on the contingency of *the death of the testator's son and heir under twenty-four*, was held not to prevent the descent to him, in respect that he had attained that age, which rather implies, that, if he had died before, the devise might have operated. That inheritance should thus begin to be subject to executory devise, may be accounted for, *from the progress of uses and trusts after the statute of uses 27. Hen. 8. and from the effect produced by the power of devising land under the statutes of 32d. and 34. of the same reign*; springing uses of the inheritance and freehold furnishing a precedent for like executory estates in the form of executory devise, and the construction of the statutory power of devising at the *free will and pleasure* of the testator affording to the judges an opportunity of exerting a discretion in favour of executory devise accordingly. The further countenance to executory devise of inheritance early in the reign of Elizabeth seems inferrable from Boulton's Case of 6. and 7. Eliz. as cited in



in 2. Ro. Rep. 217. and Palmer 132. it being stated to have been in that case agreed, on a devise to testator's wife till his son should attain 21, and then to him and his heirs or to him for ever, and in case of his dying without issue within the age of 21 years to the testator's daughter, that, if the son had not attained 21, the devise to the daughter would have been good. However Rolle in his report observes, that there was a difference in the reports of this case of Boulton; and at all events it was no more than an extrajudicial opinion. During the remainder of the reign of Elizabeth, executory devises of inheritance gained some further ground. Of this the cases of Hinde v. Lyon reported in 2. Leon. 11. and almost in the same words in 3. Leon. 64. and 70. Fulmerston v. Steward cited and stated in Palm. 135. and Cro. Jam. 592. and Wellock v. Hammond Cro. Eliz. 204. are sufficient proof. But in the first of these three cases the contingency of the executory devise depended on a *single life*; in the second the contingency was *almost immediate*; and in the third the contingency was confined to *two years*. That Lord Coke, early in the following reign, joined in sanctioning such executory devises, appears from Matthew Manning's case, which was in 7. Jam. 1. and is in the 8th report: for though this latter case was an executory devise of a term of years, yet Lord Coke, then chief justice of the Common Pleas, argued in support of the devise over of the term after an estate for life, from the sufficiency of an executory devise of the fee. A few years after Matthew Manning's case, namely, in the 18th of James, there occurred the case of Pell. v. Brown. It is reported fully in Cro. Jam. Palm. and 2 Ro. Rep. and shortly in Godb. and the margin of Dyer, ed. of 1688 fol. 354, a. and it was adjudged by the King's Bench recently after Lord Coke's being angrily removed



moved by King James. It was a devise to a younger Son and his heirs for ever, and if he died *without issue living his elder brother*, then to him and his heirs. This limitation over was solemnly adjudged to be a good executory devise by all the judges of the King's Bench. All of them, also, except Judge Doderidge, held it not barrable by a common recovery of the first devisee. It appears, that Doderidge, in so differing from the other judges, was in some measure influenced by an apprehension of having perpetuity revived under the shelter of executory devise; and if it was not for the discretion exercised by the Courts, in prescribing a time for the contingency of executory devises, such might be the consequence of holding them out of the reach of a common recovery. This case is generally looked to as the pole-star for direction in executory devise of inheritance; or, to use the nervous expression of the present chief justice of the King's Bench in *Bradley v. Porter* 3. Durnf. and East, is deemed the foundation and as it were the magna charta of this branch of our law. Sometimes also it is referred to, as if the establishment of executory devises of the fee originated from this case. But certainly they had at least been countenanced by much earlier decisions, as the before mentioned cases, of the reigns of Philip and Mary and of Elizabeth, and in the early part of James's reign, seem to shew. Certainly also the case is silent as to executory devise of chattels, and goes but a little way towards ascertaining the boundary of executory devise for inheritance. Therefore with great deference to others, I beg leave to say, that I do not feel this case as furnishing very much of the code of executory devise. However this case of *Pell v. Brown* may be properly said to have fixed, that in respect of the executory devisee's having only a possibility, his interest was not within the recompense



of a common recovery, and therefore not within the reason of it's barring; and notwithstanding the almost unreachable subtlety of the reasoning, yet, ever since, executory devises of inheritance have been held unbarrable by the common recovery of those having the present estate. It must be allowed too, that this case assists in ascertaining when limitations over, on failure of issue, after a devise to one and his heirs, should operate by executory devise, and when by remainder. Further it must be confessed, that this case finally fixed the legality of executory devises for inheritance, under the circumstance of the contingency's *not exceeding a life*; though I do not observe in any report of the case, that the judges, who differed from Doderidge on the point of recovery, were very explicit in stating, how far they were influenced by the shortness of the contingency. Chief Baron Montagu, indeed, in 3. Cha. Caf. 19. in the great case of the Duke of Norfolk, or as it is sometimes called the case of perpetuities, which was first adjudged in 1681, and of which I shall soon have occasion to make more particular mention, almost represents Pell and Brown, as if it was questionable. For this purpose he refers to the report of Gay v. Gay or Jay v. Jay in Style 258. and 274. and to the argument of Latch, who in that case asserts, that after deciding Pell and Brown the court was divided upon the point; that in the serjeant's case 21 James it was made a flat query, whether an executory devise of the freehold was good; that ever since it had been disputable; and that Pell and Brown was opposed by a solemn judgment of the Common Pleas, in a case, which however is given without the name and even with the omission of the reign. Yet neither Lord Chief Baron Montagu, nor the two chief justices Pemberton and North, who joined with him against Lord Chancellor Nottingham in the Duke of Norfolk's case,



case, ventured absolutely to deny the legality of an executory devise of inheritance: and Lord Chancellor Nottingham well observed, that queries for exercising the wits of serjeants were not governing opinions to decide the law by. Upon the whole then it may be assumed with tolerable accuracy, that executory devises of inheritance were at least sanctioned some years before the case of Pell and Brown in the 17th of James the first; and that from the time of that case their validity, where the contingency did not exceed *one life*, became unquestionable.—*From one life*, our courts gradually proceeded to *several lives wearing out at the same time*, what passed as to executory devises and trusts of terms of years assisting this enlargement; and at length the allowance of time for the contingency reached *lives in being and twenty-one years after, with an allowance of the time of gestation for a posthumous child*.—But this progress was not without struggle. In Snow and Cutler, which occurred almost immediately after the restoration, a devise to the heirs of the body of the testator's wife, if they should attain *the age of fourteen*, was warmly contested, on the ground of it's being an executory devise to a person not *in esse*, and of there being a contingency on a contingency, namely, the birth of a child and the child's attaining fourteen years. But I do not observe, that the mere circumstance of the fourteen years beyond a life was much objected to. The case is in 1. Lev. 135. T. Raym. 162. 1. Keb. 752. 800. 851. 2. Keb. 11. 145. 296. and in 1. Sid. 153. It was several times argued. It ended with the court's being equally divided. But according to Levinz's report all agreed with Pell and Brown, that executory devise might be on *one life*; and that it was not barrable by recovery. Thus the doctrine as to the compass of time for executory devises of the fee appears to have



rested 'till the case of Taylor v. Bydal, which is in 2. Mod. 289. 1. Freem. 243. and Cart. 182. and appears from the account of the record of this case in Mr. Forrester's Reports 231. to have been adjudged in the Common Pleas Hil. 29. and 30. Cha. 2. This case was considered by the King's Bench, whilst Lord Hardwicke was chief justice, as a clear adjudication for extending the contingency of executory devise of inheritance *to twenty-one years beyond lives in being*. But it was a decision by the Common Pleas, whilst Lord North was chief justice, and he concurred in it; and I know not, how entirely to reconcile it, with the strong part he afterwards took against the executory trust of a term of years in the great case of the Duke of Norfolk, except that distinctions between inheritance and terms of years were relied upon in a great degree. However, be this as it may, even the extension of *one year* beyond co-existing lives was contested soon after the revolution; nay, in the first instance even with success. The case I mean is that of Lloyd and others v. Carew, which in effect was an executory limitation of the use of lands in fee in a marriage settlement, to the heirs of the wife, *on the contingency of a failure of issue of the husband and her at the death of the survivor and payment by the wife's heir of £4,000. to the husband's heir within twelve months, after such survivor's decease*. Here the contingency extended to *two lives in being and one year beyond*: and a bill in Chancery was brought by the wife's co-heirs against the husband's heir to have benefit of the limitation on payment of the £4,000. The only report of the case is in Show. Parl. Cas. 137. and according to the account there, the court assisted by the chief justice of the Common Pleas and judge Rookeby dismissed the bill, and as it should seem, because the contingency was too remote. But the plaintiffs appealed to the  
Lords.



Lords. Before them the great point was, whether ONE YEAR *beyond lives in being* was not an excess of the time for an executory devise of the fee, or for a contingent limitation or springing use of the same nature; it being contended for the respondent, that the life of one or more persons in being was the *ne plus ultra* of executory devise. The case ended with a reversal of the decree, and consequently a precedent for *one year beyond two lives in being*. Yet soon afterwards, that is, 9. W. 3. in the case of Luddington v. Kime, which is in 1. Lord Raym. 203. and various other books, it was contended before the Court of Common Pleas, that the contingency for an executory devise of inheritance could not be extended beyond *a life in being*, even for a *posthumous child*, though the time for that is short of a year. The case went off without any decision of this point; for the whole court held, that the limitation was a contingent remainder in fee. However both Lord Chief Justice Treby and Judge Powell declared themselves on the point; Judge Powell holding, that for so SHORT A TIME *as the birth of a posthumous child* a life in being might be exceeded; but Lord Chief Justice Treby protesting against going an iota beyond *the life of ONE PERSON in being*, and relying upon what passed in the before-mentioned case of Snow v. Cutler. About three years after this case of Luddington and Kime, the subject of executory devises was discoursed upon, with a fullness and particularity even exceeding the discussion in the great case of the Duke of Norfolk, which I shall have occasion to mention when I come to executory devises of terms for years. The case I now allude to is Scattergood v. Edge. It is in 2. Salk. 229. 12. Mod. 277. and in the supplement to the edition of 11. Mod. published in 1781. The latter book includes the record, and contains far the largest report, and is from a manuscript of Mr. Lutwiche, who was one of the arguing



guing counsel when the case was carried by writ of error into the King's Bench. It was first adjudged by the Common Pleas Hil. 12. W. 3. On error the King's Bench affirmed the judgment. The arguments of the judges of the Common Pleas are fully reported, more particularly by Mr. Lutwiche. But I do not find any report of the arguments of the judges in the King's Bench. The manner, in which the judges of the Common Pleas are stated to have expressed themselves, *against enlarging the limits of executory devise*, deserves minute attention in some points of view. But the case was of a very mixed and complicated nature; and so far as it concerns the history of executory devise of inheritance, the chief thing to be collected from it is, that, notwithstanding some of the prior cases, the judges considered *lives in being* as the *ultimatum* of contingency in remoteness. As late as the year 1722, it was strongly argued, that this time should not be exceeded, even to include a child *en ventre sa mere*; and therefore that an executory devise of inheritance to the son of one being a batchelor was too remote. So it was argued by Mr. Serjeant Bootle in Gore and Gore before the King's Bench 6. Geo. 2. as reported in 2. W. Kel. 204; and Mr. Peere Williams, according to his report of his own argument on the same side in the same case, though he occupied other grounds, insisted on the benefit of that point; and the first certificate of the King's Bench, namely, by Lord Chief Justice Pratt, and the judges Eyre, Powis and Fortescue Aland in 1722, was according to the report in 2. Stra. against the executory devise on that very ground. But the second certificate of the King's Bench to Chancery in Gore and Gore, which was by Lord Hardwicke and the judges Page Probyn and Lee, was for the executory devise; and even the first certificate, though against the executory devise as too remote, was according to the



the report in 9. Mod. 4. founded on the circumstance of a precedent term of 500<sup>d</sup>. years. Yet still it was doubted, whether, on an executory devise of the fee, the addition of *twenty-one years to lives in being* should be allowed. At length, however, there was a complete judgment for extending executory devise of inheritance to *lives in being and twenty-one years after, with the allowance of the proper time for a posthumous child*. But this was not accomplished till so lately as the year 1736. The case, which so settled the point, is *Stephens v. Stephens* sent out of Chancery by Lord Chancellor King. It is stated in Forreft. 228. with a copy of the certificate by Lord Hardwicke and the three other judges of the King's Bench. The report of the arguments at law is in 2. Barnadist. 375. and 2. W. Kel. 168. The certificate of the four judges is expressed with great care and explicitness. It acknowledges, that they could not find any case, wherein the executory devise of a freehold had been held good, where the vesting of the estate was suspended until a son unborn should attain twenty-one, except the before-mentioned case of *Taylor and Bydal*. But they represent the record of that case to agree in the material part with the printed report in 2. Modern Reports. Therefore they say, that, however unwilling they may be to extend executory devises beyond the rules generally laid down by their predecessors; yet upon the authority of that judgment and its conformity to several late determinations *in cases of terms for years*, and considering that the *power of alienation would not be restrained longer than the law would restrain it*, namely, during the infancy of the first taker, which could not be reasonably said to extend to a perpetuity, they were of opinion, that the devise in question might be good by way of executory devise. Ever since this decision, **executory devises of inheritance**, to the extent of lives in being



ing and 21 years after, so as to include a posthumous child, appears to have been allowed without the least controversy, and as it seems upon an understanding, that the boundary of executory devise is universally the same, that is, the same for inheritance as for terms of years and chattels personal. Accordingly Lord Kenyon in the late case of Long and Blackall 7. Durnf. and East. 100. which was on the executory devise of a term of years, so states the limits for executory devise generally. I presume also, that your Lordship's sending this last-mentioned case for the opinion of the King's Bench did not proceed from a doubt, whether the boundary of executory devise was established to the extent I have just stated. The case, I can guess, had a very different object in view, though from the report of the manner in which the case was spoken to in the King's Bench both by the court and counsel, to me at least it seems, as if that object was not quite perceived. From the circumstances of the executory devise then in question, it's validity could not be supported without an allowance *twice over* of the time for a posthumous child, and in the first instance an allowance *of the life of the posthumous child besides*. In effect it was an executory devise of a chattel lease, in trust for a son of the testator *EN VENTRE SA MERE at the date of the will and not born till after the testator's decease, and after the decease of such son in trust for such issue male or the descendant of such issue male of such son as at his death should be his heir at law*, with a limitation over, which was the devise in question, if at the death of such son there should be no such issue male or descendant of issue male then living, or if the child *en ventre sa mere* should not be a son. Therefore I apprehend the objection to have been, that to begin with a devise to a posthumous child for his life, and to graft upon it a limitation over on failure of heirs male of his body at his death,



death, which of course would include an heir male then *en ventre sa mere*, was to begin with allowance for a posthumous child, then to comprehend such child's whole life, and afterwards to have the allowance for a posthumous child again; and consequently to claim having such allowance twice over with the life of the posthumous child in the first instance immediately, and so to enlarge the *nine* or *ten* months for a posthumous child beyond lives in being and twenty-one years after to *eighteen* or *twenty* months, with the whole life of a posthumous child into the bargain. Such an enlargement of the boundary of executory devise was, I presume, the great point, upon which it was intended to have the opinion of the King's Bench. But from the turn this case, of which hereafter I shall have occasion to speak in a very particular manner, took there, it seems at least doubtful, whether if such was the point, it ought to be considered as fully adjudged.

IN respect to executory devises of *terms for years*, the older cases are express against devising over a term after a devise of it to one for life. The case of 6. Edw. 6. Dy. 74. b. is a judgment to that effect; and there Lord Chief Justice Montagu and Judge Hales state the point to have been so ruled by all the Judges, whilst Lord Rich, who had recently resigned the great seal, was Lord Chancellor. There is, indeed, a case of 28. Hen. 8. in Dy. fol. 7. a. in which Judge Englefielde thought a devise over of a term, even after a devise to one and the heirs of his body, allowable. But he was overruled by the Judges Baldwin and Shelly; and these latter said, that it was as contrary to law to limit a term in remainder, as it was to limit such a remainder of a personal chattel. However, in the latter end of the case, Baldwin rather appears to admit, that the executory devise would have

As to terms  
of years.



been good, if the first devise had been for life. But this was extra-judicial; and it was adjudged to the contrary in the before-mentioned case of 6. Edw. 6. The reasons, however, against devising a term over after an estate for life were very artificial; for they appear to have been no better, than the exility or small consideration of a term, an estate for life being legally a greater interest than the largest term, and the now exploded notion of our law's not allowing a possibility upon a possibility, which the limitation of a term after an estate for life is, one contingency being surviving the first taker, the other being the first taker's outliving the term. In the reign of Elizabeth, the Judges, under a nice distinction between devising *the term itself* and devising only *the use of it*, relaxed from this strictness as to a term, where the devise over was after an estate for life, as appears by the case of 10. Eliz. Dy. 277. b. the case of Weleden v. Elkington 19. Eliz. Dy. 358. b. and Plowd. 519. and the case of Paramour v. Yardley Plowd. 539. But the executory devise of a term for years was not considered as quite safe, against sale by an executor or administrator under colour of their not being assets to pay debts; and the case of Handall v. Brown 1 Jam. Mo. 748. proves, that such danger was not imaginary. This danger, which must ever belong to the devise of a term of years, with some doubtfulness, which still prevailed as to the sufficiency of the later authorities to overrule the old doctrine against limiting over terms of years, carried executory devises of terms into Chancery, to obtain, as well security against alienation of the term, as the shelter of trust; and there relief was given accordingly, of which the case of Cole v. Moore in Chan. 5 Jam. Mo. 806. is a precedent. About the same time the Courts of common law became less subtle and more firm in supporting the executory devise of a term;



for in Matthew Manning's case 7. Jam. 8. Co. it was in vain insisted, that a termor could not in his life grant his term over to one for life, with remainder to another, and therefore could not so devise; and Lord Coke and four other judges resolved in favour of the executory devise, and also overruled the distinction between devising a term of years and devising the use of the term. Lampet's case 10. Jam. in 10. Co. gave new strength to the decision in Matthew Manning's case. Then one should have thought the question as to executory devise of a term of years at rest. But still the judges were so jealous of and so averse to executory devises, that Lord Coke was scarce removed from the King's Bench, when the controversy as for terms of years in a manner revived. This appears from the case of Child v. Baily 20. Jam. in W. Jo. 2. Ro. Rep. and Palm. for according to the report in Sir William Jones, ten judges against two condemned the executory devise of a term to one son, with a limitation over to another son, *if the former died without issue in the lifetime of the latter*. Absolutely revoking the decision in Manning's case and Lampett's case was not avowed by the ten judges. But they openly declared *against going a step further*; and it was relied upon, that the devise in this case of Child and Baily was *equivalent to a devise to one and the heirs of his body with limitation over*, and therefore differed from the cases of Manning and Lampett. Indeed in that point of view, though the confining of the contingency of the limitation over to a failure of issue during a life in being, and the circumstance of there being no express devise of the term to the heirs of the body of the first devisee, furnished a strong answer to the objection of its being a devise over of a term after an estate to the first devisee and his issue: yet there was not wanting the color of reason to support the decision in this



case of Child and Baily; for an unqualified executory devise of a term, after a devise to one and the heirs of his body, is on the contingency of a general failure of issue, and so leads to a palpable perpetuity; and as the judges, however wrongly, considered the case, the devise was constructively tantamount. In that point of view also, that is, as the devise of a term after a prior devise to one and the heirs of his body, Child and Baily was a proper reprobation of the executory devise of a term. There are many early cases to the same effect. Those at law are *Saunders v. Cornish* 7. Cha. 1. Cro. Cha. 279 and 1. Ro. Abr. 612 and *Leventhorp and Ashby* 11. Cha. 1. Wm. Jo. 15. After the Restoration the illegality of limiting terms or trusts of them after an estate tail or a general failure of issue was several times confirmed, as appears, by *Aprice v. Flower* in 13. Cha. 2. reported in Pollexf. 27. 1. Cha. Rep. 175. and Lord Nottingham's manuscript *Prolegomena of Equity*, *Pearce v. Reeve*, also 13. Cha. 2. reported in Pollexf. 29. and the same manuscript, *Backhouse v. Bellingham* 16. Cha. 2. in Pollexf. 33. and the same manuscript, *Burgefs v. Burgefs* May 1674 in Pollexf. 40. 1. Mod. 14. Reports temp. Finch 91. 1. Cha. Caf. 229. and Lord Nottingham's Mfs. Rep. and his Mfs. *Prolegomena*, *Love v. Windham* 22. Cha. 2. *Knight v. Knight* 23. Cha. 2. and 1. Mod. 50. 1. Lev. 290. Pollexf. 42. and both of the manuscripts last mentioned, *Warman v. Warman* July 1672 in Pollexf. 112 to 123. and the same two manuscripts also, and *Osgood v. Osgood* May 1674, which is in Lord Nottingham's manuscript *Prolegomena* and there only. It is observable on the certificate in one of these cases, namely, *Pearce v. Reeve*, the certificate in which is given at length in Pollexfen, that Hide Twisden and Brown, the three judges who certified to Lord Clarendon, were not content



tent with declaring the limitation over of the trust of a term, after failure of heirs of the body or of issue understood in the same large sense, void; but in some degree revived the old objection of its being a possibility on a possibility, the husband and wife to whom the term was first limited, not having had any child in esse at the creation of the trust; and actually stated such a double possibility to be against law. It is also observable, that though in the same certificate the three judges allow, that it was not fit to call in question the judgment in *Matthew Manning's* case; yet they declared, *they did not think it safe to stretch the law against its ordinary rules further than it had been done in that case.* This seemed like reverting, to the doctrine of confining the devise over of a term to one life, and to requiring that life to be in esse. Even the case of *Warman v. Seaman*, in which Lord Nottingham himself yielded to holding the limitation over void, if not carefully attended to, may seem to favour the same notions: for the limitation over was to *children* and not to *issue*. But Lord Nottingham's own account shews, that in the first opinion he gave he considered the word *children* in the strict sense; and that in the decision he finally made, he acquiesced in an opinion of all the judges, partly upon the consideration of understanding the word *children* as equivalent under all the circumstances of the case to *heirs of the body*. Therefore he only meant to concede, that the limitation over of the trust of a term where *unqualifiedly* made after an interest in the nature of an estate tail, could not be supported: which was a doctrine he never appears to have denied, and which he most expressly approves both in his *Prolegomena* and in his judgment in the great case of *Howard* and the Duke of Norfolk. But where the devise over of a term was only after an estate for life, it was more than adjudged good soon after



after the Restoration. The doctrine was a little further extended: for the limitation over of the trusts of a term was allowed *after two co-existing lives*. This was decreed by Lord Chancellor Clarendon 14. Cha. 2. on the joint opinion of the chief justices Forster and Bridgman and of Hale chief baron, in the case of Goring v. Bickerstaffe and Althorp and others; Lord Clarendon upon a rehearing reversing the first decree. The case is in Pollexf. 31. 1. Cha. Caf. 4. and 2. Freem. 163. and in the four volumes I have of Lord Bridgman's manuscript Reports of Judgments whilst he presided over the Common Pleas, there is his own report of the case by the name of Althorp's Case; and it is also reported in Lord Nottingham's manuscript Prolegomena. According to Lord Nottingham's report, it was resolved "that the limitation

 "of a term to SEVERAL PERSONS IN REMAINDER ONE AFTER  
 "ANOTHER, *if they be all in being and alive together*, is good;  
 "and doth in no sort tend to the perpetuity of a chattel,  
 "especially where each remainder is but for life, and *so all*  
 "the candles are as it were lighted together: but OTHERWISE  
 "IT MIGHT BE, *if a remainder was limited to a person not in*  
 "*esse*." Lord Bridgman's report of the case confirms this account, except that he represents the opinion as coming from himself and Lord Hale, and Lord Forster as only not gainsaying it. The phrase, *that the candles are all lighted at once*, which has been current ever since, Lord Bridgman gives as Lord Hale's words. But even this adjudication of Althorp's case, so extending the executory devise or trust of a term, from one to *several lives, of persons IN REMAINDER ONE AFTER ANOTHER*, did not quite settle the matter as to terms of years. On the contrary, in the latter end of the reign of Charles the second, the controversy was resumed with great heat; and the battle of executory devise for terms of years was completely re-fought.



fought. This revival of the attack upon executory devise of a term was in the great case of Howard and the Duke of Norfolk, which I have already had occasion to refer to, and which as I have before-mentioned is sometimes called the case of perpetuities. The case is in 3 Cha. Caf. 1. 2. Cha : Rep. 229. 2. Freem. 72. and 80. and Pollexf. 223. and Lord Chancellor Nottingham in his manuscript Chancery Reports gives his own argument on delivery of his judgment after hearing the three chiefs from whom he differed. In this famous case, Mr. Howard, a younger brother of the Duke of Norfolk, claimed against the Duke the benefit of the trusts of a term of 200 years in the barony of Greystock, under settlements made in 1647 and as it was understood with the advice and approbation of Lord-keeper Bridgman, then a practising counsel. The language of the trust was particular and was thus. By one deed the barony was limited to the Earl of Arundel the Duke's father for life, remainder to the Duke's mother for life, remainder to trustees for a term of 200 years, remainder to Thomas Lord Maltravers the Earl's eldest son, being insane and unmarried, in tail male, remainder to the Duke then Henry Howard who was the second son of the Earl in tail male also. By another deed of the same date, the term was declared to be *in trust to attend the inheritance so long as Thomas Lord Maltravers the lunatic or any issue male of his body should live* (which to simplify the case and clear it from the opening for objection from the words *issue male of the body*, Lord Nottingham said was consequently only during his life, because he was never likely to marry) but if he should *die without issue in the life-time of his brother Henry Howard afterwards Duke of Norfolk and the defendant in the cause, not leaving a wife privement ensient with a son; or which seems to have been intended as another way of expressing*



pressing the same thing, if, after the death of Lord Maltravers without issue male, the earldom of Arundel should descend on his brother Henry afterwards Duke of Norfolk, then in trust for the plaintiff Charles Howard. As was expected, Lord Maltravers the lunatic died a bachelor; and then the Duke having become tenant in tail male subject to the term of 200 years, his brother Charles claimed the trust of the term. Whether the limitation over, under which he claimed, was too remote, was the principal question, though not the only one. Lord Nottingham called in to his assistance the chief justices Pemberton and North, and the chief baron Montagu. *The three chiefs were all against the legality of the trust, under which Mr. Charles Howard claimed. But notwithstanding this, Lord Nottingham decreed for him.* The great strength of the case against the trust was, that the trust to attend the inheritance whilst Lord Maltravers or any of his issue male was living might be deemed equivalent to a limitation over in trust for him in tail, and so became in the nature of a limitation over after a vested remainder in tail, and therefore after a failure of issue generally. Had the three chiefs been content with that mode of reasoning, Lord Chancellor Nottingham would have had less opportunity of objecting fallacy to their reasoning; and in that consideration of the case various authorities, particularly Child and Baily, which the three chiefs greatly relied upon, seemed to press hard against the Lord Chancellor. But the three chiefs took a larger scope; and from their dislike of the doctrine of executory devise and their zeal to stop its progress, they declaimed at large against executory devises as leading to perpetuities; and though they did not absolutely deny the legality of executory devises of inheritance, yet they insisted upon some grounds, which seemed to amount to excluding their influence



influence over terms of years, and consequently tended to impeach the cases of Manning and Lampett, and to revive the doctrine which those cases had in great measure exploded. This gave great advantage to Lord Nottingham; and he availed himself of it. On the one hand, he treated the case, as in effect only the executory trust of a term on the contingency of a life in being, that is, the death of Lord Maltravers without leaving issue in the life-time of his brother the Duke: and so, as if the previous trust of attendancy on the estate tail of Lord Maltravers was no material part of the case, he did not dwell upon it; for exclusive of his particular observations against the case of Child and Baily, which was mainly relied upon as authority against him, he scarce more than hinted, that Lord Maltravers's insanity delivered the case from the objection of a previous estate tail. On the other hand, in every other branch of the argument, that is, in answering all other objections to the trusts of the term, such as the exility of estate, its being a double contingency, the supposition of perpetuity when clearly the contingency was only the single life of Lord Maltravers and the time for the birth of a posthumous son to him, and the apprehension of danger on that account, he was full and convincing. He argued as a man; who clearly saw the weakness of the grounds to which his opponents had resorted to assert their opinion; and who saw also, that, independent of the objection from the resemblance of the previous trust of attendancy on a vested remainder in tail male to such a previous remainder itself (which I conceive however was the real pinch of the case) both the reason of the thing and the strength of authorities were with him. Accordingly Lord Nottingham, *notwithstanding the united opinion of the three chiefs his assessors to the contrary*, made a decree sustaining the trusts of the term for Mr. Charles Howard. This



decree was made in June 1682. But after Lord Nottingham's death, which was in the November following, there was a bill of review; and Lord North, being then Lord-keeper, reversed Lord Nottingham's decree. However upon an appeal to the House of Lords, they in June 1685 reversed Lord North's decree and affirmed that of Lord Nottingham; Lord Jeffries being understood to have acceded to Lord Nottingham's opinion, and to have been active in supporting it. By this final affirmance of Lord Nottingham's decree, the great point of controversy, as to the liability of terms for years to executory devises and to trusts of the same nature, was considered as closed: for the principle of the decree was, that they were equally subject with inheritance. It was also thought to be within the principle of the decree, that so long as the strict settlement of any species of property, by executory devise or by trusts of the same nature, did not exceed the ordinary time for barring a regular entail by estates for life with remainder in tail to an unborn child, which was when such child should attain twenty-one, it would be considered as allowable. This led to a general practice, of settling terms of years, and of providing portions for children under the trusts of such terms, to the extent of lives in being and 21 years after: and at length, as I have already shewn, such practice was made a chief ground, whilst Lord Hardwicke presided over the King's Bench, of extending executory devise of inheritance in like manner; the practice for terms of years thus assisting the extension of executory devise of inheritance, as the precedents for inheritance had before assisted to establish executory devise for terms of years. But Lord Chancellor Nottingham foresaw the possibility of future abuse of executory devise; and having supported it to a certain extent, by an exercise of judicial discretion on the principle of *convenience*, he took  
care



care in his eloquent judgment in the Duke of Norfolk's case to have it well understood, that there was reserved to the Courts a right by a like exercise of judicial discretion to prevent *inconvenience*. His language on this topic is of importance to be remembered, more especially in the present case, which in some views of it may very much depend on an exercise of the power of controul thus reserved. As the manuscript of his own reports states his words, they were as follow.

"It has been urged at the bar, where will you stop, if you do not stop at Child and Baily's case? I answer, I will stop EVERY WHERE WHEN ANY INCONVENIENCE APPEARS; no where before. It is not yet resolved, what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to the springing trusts of a term. *Whensoever the bounds of REASON or CONVENIENCE are exceeded, the law will quickly be known.*"

As to *chattels personal*, the controversy about executory devise of them in some degree continued, even after close of the dispute about terms of years. The doctrine of ancient times made a subtle distinction, between devising a chattel itself and devising the use or occupation of it. If the gift or devise was of *the chattel itself* only for an hour, it operated for ever, and wholly passed the property to the donee or legatee, so that he might give sell or dispose of it, and any limitation over was void. But if a devise was of *the use or occupation of a chattel* to one for life, and if he died within the term to another, the executor assenting to the legacy, it was said, that the first taker had only such use and occupation, and after his death the other had the property. This distinction is stated by Lord Chief Justice Brooke in his Abridge-

As to chattels  
personal.



ment title Devise pl. 13. and he represents it as agreed in the times of Hen. 8. and Edw. 6. to be good law, he at the same time referring to the year book of 37. Hen. 6. 30. and abridging from it a case containing the very same distinction. How this distinction became over-ruled as to chattels real, appears from the history I have given of executory devise as to terms for years. But the distinction seems to have survived some time longer for chattels personal. Mr. Peere Williams's Reports, it is observable, begin with an equity case on this subject of as late date as Easter 1695. The case is *Hyde v. Parrott* in 1. Wms. 1. and 2. Vern. 331. It arose on a devise of household goods to one for life, with limitation over to another. Mr. Peere Williams gives a full report of his own argument against the devise over; and in it the old reasoning and authorities against executory devises of chattels are referred to. He allowed the law to be at length fixed as to terms for years: but he insisted, that chattels personal were distinguishable both in reason and authority; in the former, from their being in the most part exposed to the casualties of loss and perishableness; in the latter, from the want of those decisions which ruled terms for years. The cause was first heard before Mr. Baron Powell sitting for Lord Somers; and the former treated the point so seriously as to reserve it for his Lordship. Even the latter took time to consider the point. But at length he held the devise over good; and from that time the liability of personal chattels, to executory devise, in the like manner as chattels real, seems to have been treated as fully settled. In that way Lord Macclesfield in the cases of *Tiffin v. Tiffin* and *Upwell v. Halfey*, both of which are in Mr. Peere Williams's first volume, seems to advert to the doctrine as not longer questionable. Accordingly also in *Sabbarton v. Sabbarton*; which Lord Chancellor Talbot sent to the  
the



the King's Bench on a mixed devise of inheritance and of stocks; and which therefore left an opening for doubt, whether the latter should not follow the entail of the former; the case, as appears from the report of it in Andrews, was argued in the King's Bench as an executory devise depending on the extent of the rule for the trusts of a term of years.

THUS at length a great though partial victory appears to have been gained, for executory devises, and for limitations and trusts of the same nature, over every species of property in England: that is, over freehold and inheritance; over real chattels; and over chattels personal.—Thus neither the feudal strictness of conveyance in the first of those three kinds of estates, especially against creating a freehold in futuro; nor the exility and meanness of interest in the second; nor the moveableness casualness and perishableness of quality in the third; nor the doctrine against possibility on possibility, with the danger of perpetuity and of abuse in other respects as to all three; finally availed to accomplish the absolute exclusion of executory devise: all these objections being so successively encountered and so successively subdued, that at the utmost they have only contributed to reduce executory devise within regulation and circumscription.

Short result of the preceding history of executory devise.

BUT from the preceding history of the rise progress and final establishment of executory devise, which for the purpose of the present case I have laboriously extracted out of an indigested mass of materials frequently obscure and almost always dry even to the most professional practitioner, it appears, that the struggles against executory devise were long and obstinate, and were sanctioned by judges and lawyers of the first eminence.

Inferences.

NOTWITH-



NOTWITHSTANDING also the imperfection of my historical deduction (for in many points of view, though I trust not very much in those more immediately connected with the present argument, I feel it to be imperfect) there is I conceive enough to found very important inferences; not only such as evince the right of our Courts of justice to check the excess and over extension of executory devise, and to prevent an abusive application of the indulgence it grants; but such, as may more particularly be made to bear upon the trusts now in judgment before your Lordship.

PROBABLY those, who, with profoundness in this branch of our juridical system unite a vigorous penetrancy, would in this respect easily and quickly perform that duty for the purpose of the present case. But I have found a serious pause requisite. After, however, close and industrious attention to the subject, I feel myself justified, and by the nature of the present case called upon, to offer the following inferences from the history of executory devise, as subsidiary and introductory foundations of argument against the trusts now in question; the other inferences, which that history may furnish to the present case, being reserved for application, in the argument of the particular points, into which I propose breaking the case.

First inference.

IN the FIRST place I submit, that executory devise appears to be, not a genuine ancient branch of our law, but an *indulged superinduction* to it; not a *regular production* of our general system, but an *excrecence*; not a *strictly regular species of entail*, but a *permitted irregular mode of settlement*; not a *legitimate offspring of our common law*, but a *privilege gradually insinuated into our jurisprudence*. It operates, by creating future estates and interests



of every kind, freehold as well as chattel, in a way not endured by our common law;—in a way quite inconsistent with the solemnity of its forms as to freehold;—in a way, which, without the rules the Courts of Westminster Hall have by an exercise of discretion introduced to circumscribe this mode of creating estates, would have afforded the opportunity, of making inheritance and freehold and chattel almost ever uncertain precarious and determinable, and consequently of making property almost eternally unalienable. The rule, against creating a freehold *de futuro*, makes it impracticable so to create a freehold by any common law conveyance; and as for any lesser estate, terms of years were anciently rather contracts than estates; and even now future interests in the nature of remainders *cannot* be created in chattels real and personal, except through the medium of uses trusts and executory devise. Nay, executory devise is still so considered as a privilege, and so much disfavour is still shewn to it, that a rule has prevailed ever since its introduction, against construing any estate as operating by executory devise, where it can take effect by remainder. This rule is particularly mentioned by Lord Hale in *Purefoy and Rogers* in 2. Saund. 388. and has been since acted upon in an abundance of cases, of which some of the principal are enumerated in the beginning of Mr. Fearne's excellent Treatise on Executory Devises. Even Lord Mansfield, who was not indisposed to emancipate the construction of wills from every thing like technical restraint, confessed, in the case of *Goodtitle and Billington* in Mr. Douglass's Reports, that such clearly was the rule; and the present chief justice of the King's Bench, in the case of *Doe and Morgan* 3. Durnf. and East 763. goes the length of saying, that if ever there was a rule concerning executory devises, which has uniformly prevailed without any exception, it is what  
Lord



Lord Hale lays down against resorting to executory devise, where remainder can operate. As I have already explained in the history of executory devise, it is upon the whole an irregular species of entail, little countenanced till some years after the death of Henry the eighth, and not thoroughly fixed even for inheritance till the case of *Pell v. Brown* in the 17th of James the first; and this account of the matter doth not much differ from the notion of Lord Kenyon in 3. Durnf. and East 765, where he states executory devises as established in the reign of Charles the first. Whilst also this priority or precedence of remainder continues, so long there will exist a badge, not only of the juniority of executory devise, but of the disfavour of our law towards it, and of its being an indulgence.

Second inference.

IN the NEXT place I submit, that this indulgence of executory devise appears to have originated, from *an exercise of discretion by our judges FOR THE SAKE OF GENERAL CONVENIENCE*. The statute of 27. Hen. 8. for annexing the possession or legal estate of land to the trust or use, or, as we usually term it, for transferring uses into possession, together with the statutes of the 32d and 34th of the same reign giving the power to devise lands, might indeed lead to executory devises. But the establishment of them seems to be more properly referable to the judges themselves. At the utmost, the statutes, I have just mentioned, can I think only be considered, as affording to the judges a better opportunity of permitting executory devise; for certainly there is not any thing in those or any other statutes professedly introductive of executory devises, and still less is there in them any regulation of them. Nor is this manner of stating the organization of executory devise substantially novel. It is in effect



effect exactly Lord Kenyon's notion of it as reported in the case of Doe on the demise of Muffel against Morgan in 3. Durnf. and East: for there his lordship is stated to have said, that "it was some time before executory devises were *permitted* " *by the courts of law*; but being found of *general utility*, they " were established in the time of Charles the First." The same notion may be traced in the reports of Scattergood and Edge, which I have before mentioned as a famous case on the subject of executory devise some few years after the revolution. It may be traced also into the great case of the Duke of Norfolk in the reign of Charles the Second, upon which I have before so much enlarged; or rather into the cases of the prior reigns of the first James and Charles.

FURTHER I beg leave to assert, that ALL THE RULES, by which executory devises and limitations and trusts of the same nature are CIRCUMSCRIBED, appear also to have ORIGINATED IN THE DISCRETION OF THE JUDGES, and to have been from time to time made by them, as occasion demanded upon the principle of preventing public inconvenience from the permission thus indulged. Executory devise was, as I have shewn, not regularly admitted till about two centuries ago. The rules for circumscribing it are consequently not of earlier date, and there are not any statutes for the purpose. It is impossible, therefore, that the rules should be derived from any other source than the discretion of the judges. For general utility and public convenience they permitted executory devise. But it was seen, that if executory devise or use or trust of a similar nature was permitted without some restrictions, great abuses might be generated. It was soon settled by the courts of law, that executory devise could not be barred by common recovery, that is, as early as the case of Pell and Brown in the 17th of James the First.

Third inference.

I

Afterwards,



Afterwards, though not without much contest, it was further settled, that executory devise might be so shaped, as to make the devisee uncertain (o) till the very instant appointed for rising of the executory estate. But executory devise, thus unbarable by recovery or otherwise, and thus uncertain as to the person of the devisee till the moment of taking effect, if some limit had not been prescribed, would have been a shelter for perpetuity. To prevent such an abuse, the judges limited the time for the contingency, on which an executory devise was to operate; holding, that unless the contingency was such, that if it ever happened, it would necessarily happen within a limited space of time, the executory devise should be deemed illegal, and considered as a nullity. Thus, as for the sake of general utility the judges exercised a discretion in permitting executory devise to be introduced; so to prevent public inconvenience, they limited the time for the contingency, and proscribed all contingencies exceeding that time as too remote and therefore against law. The courts of equity followed the courts of law in this, and circumscribed trusts of the nature of executory devise in like manner. Hence GRADUALLY arose the boundary, which now circumscribes executory devises, and limitations and trusts of the same nature; namely, the rule confining the contingency for the springing up of future and executory estates to the compass of a life or lives in being and 21 years after, including a sufficient number of months for the birth of a child *en ventre sa mere*.

Fourth inference.

STILL FURTHER as I conceive, it appears, that this limitation of time, for the contingency of executory devise, was a boundary, which the discretion of the courts of Westminster

(o) See case of Snow v. Cutler, before page 35.



Hall established, *with reference to the space of time, during which, according to the course of an ordinary entail, of land by estates for life with remainders to unborn sons and daughters in tail, inheritance may be kept unalienable.* Under this latter and direct and regular species of entail, inheritance may be so settled, as to render barring of the entail impracticable, till the tenant for life has had issue, and such issue has attained twenty-one, and so becomes qualified to suffer a common recovery or to levy a fine according to the nature of the case: or, by making the parent tenant for a long term of years if he shall so long live, and vesting the freehold in trustees during his life to preserve contingent remainders, may be so settled, as to protract a compleat bar of the entail till both the child's attaining twenty one and the death of the parent. The rule, therefore, as to the boundary of executory devises, was a restriction introduced by the courts of Westminster Hall to prevent entail by executory devise from going further than entail by remainders. It was much the same, as if the judges had said, "It is required by general convenience, that we should permit entail by executory devise and by limitations of a like description. For *inheritance*, it would be hard to disappoint such a mode of settlement, though for *that* the regular mode might be resorted to. For *chattels* both real and personal, it would be still harder not to permit executory devise and limitations by trust of the same description; because otherwise the settlement of terms of years and of personal chattels, for securing portions of younger children, and for other family and necessary purposes, would be in a manner impracticable. We therefore indulge this irregular kind of entail and settlement. But we must take care not to indulge it, so as to protract it's duration beyond the period allowed to the antient and regular mode of entail by remainder. As too



“ fines or common recoveries will not apply for barring entail  
 “ by executory devise, we must substitute some other mode of  
 “ circumscribing it's duration. For that purpose we will con-  
 “ stitute such limits for executory devise, as shall prevent it's  
 “ operating one iota beyond the usual time for suffering a com-  
 “ mon recovery in the case of a family settlement by remain-  
 “ ders. Accordingly we declare, that, when executory devise  
 “ is preceded by giving such an interest as is equivalent to an  
 “ estate tail; or when without giving such a preceding equi-  
 “ valent interest the executory devise limits a future estate on a  
 “ contingency, which may happen after the expiration of lives  
 “ in being and 21 years beyond, that is, may happen beyond  
 “ the usual time for a common recovery to bar an ordinary en-  
 “ tail on an existing person for life with remainder to his un-  
 “ born issue in tail; in either case the executory devise shall be  
 “ void for remoteness of contingency and have no effect.”

IN thus explaining the principle, upon which our courts of law have erected a boundary for executory devise, and our courts of equity have done the same thing for limitations of the same nature by trusts, I only express what many years ago I stated on this subject, first at the end of a note in my part of the new edition of Coke upon Littleton (*p*), and some years afterwards in my argument in Wicker and Mitford (*q*), which is in the volume of Law Tracts I published in 1788.

My note in the Coke upon Littleton was as follows:  
 “ Here *two* things seem essential to an entail within the statute  
 “ *de donis*. One requisite is, that the *subject* be land or some  
 “ other thing of a *real* nature. The other requisite is, that

(*p*) Co. Litt. 13th fol. 20. a note (5).

(*q*) Hargrave's Law Tracts, p. 518.



“ the *estate* in it be an *inheritance*. Therefore, neither  
“ *estates pur autre vie* in lands, though limited to the grantee  
“ and his heirs during the life of *cestui que vie*, nor *terms*  
“ *for years*, are entailable any more than *personal chattels*: be-  
“ cause as the latter, not being either interests in things *real*  
“ or of *inheritance*, want *both* requisites; so the two former,  
“ though interests in things *real*, yet not being also of *inheri-*  
“ *tance*, are deficient in *one* requisite. However, *estates pur*  
“ *autre vie*, *terms for years*, and *personal chattels*, may be so  
“ settled, as to answer the purposes of an entail, and be ren-  
“ dered unalienable almost for as long a time, as if they were  
“ entailable in the strict sense of the word. Thus *estates pur*  
“ *autre vie* may be devised or limited in strict settlement by  
“ way of *remainder* like *estates of inheritance*; and such, as have  
“ interests in the nature of *estates tail*, may bar their issue and  
“ all remainders over by *alienation* of the *estate pur autre vie*,  
“ as those, who are strictly speaking tenants in tail, may do by  
“ *fine* and *recovery*; but then the having of issue is not an essen-  
“ tial preliminary to the power of alienation in the case of an  
“ *estate pur autre vie* limited to one and the heirs of his body,  
“ as it is in the case of a conditional fee, from which the mode  
“ of barring by alienation was evidently borrowed. The man-  
“ ner of settling *terms for years* and *personal chattels* is different;  
“ for in them no *remainders* can be limited: but they may be  
“ entailed by *executory devise* or by deed of *trust*, as effectually  
“ as *estates of inheritance*, if it is not attempted to render them  
“ unalienable beyond the duration of lives in being and 21  
“ years after, and perhaps in the case of a posthumous child a  
“ few months more; a limitation of time, not *arbitrarily* pre-  
“ scribed by our courts of justice, but wisely and reasonably  
“ adopted in analogy to the case of freeholds of inheritance,  
“ which cannot be so limited by way of remainder as to post-  
“ pone



“pone a complete bar of the entail by fine or recovery for a  
 “longer space. It is also proper to observe, that in the case  
 “of terms of years and personal chattels, the *vesting* of an in-  
 “terest, which in reality would be an estate tail, bars the issue  
 “and all the subsequent limitations, as effectually as fine and  
 “recovery in the case of estates entailable within the statute *de*  
 “*donis*, or a simple alienation in the case of conditional fees  
 “and estates *pur autre vie*; and further, that if the executory  
 “limitations of personalty are on contingencies too remote,  
 “the whole property is in the first taker. Upon the whole,  
 “by a series of decisions within the last two centuries, and  
 “after many struggles in respect to personalty, it is at length  
 “settled, that every species of property is in *substance* equally  
 “capable of being settled in the way of entail; and though the  
 “modes vary according to the nature of the subject, yet they  
 “tend to the same point, and the duration of the entail is cir-  
 “cumscribed *almost* as nearly within the same limits, as the  
 “difference of property will allow.”

My remark in the Law Tracts was in these words:

“WHEN executory devises were first permitted, it was fore-  
 “seen, that entails made in that form could not be barred by  
 “fines or recoveries.—If they were of *real* estate, the executory  
 “devise could not be barred by fine; because the title of the exe-  
 “cutory devisee is not *through*, or as *privy* to the immediate  
 “taker, but quite independent of him: nor could the execu-  
 “tory devisee be affected by a recovery, it being soon settled,  
 “that the recompence, which in the supposition of law is the  
 “ground of barring the issue in tail and those in remainder  
 “and reversion, doth not extend to an executory devisee (*r*).

(*r*) Pell v. Brown, Cro. Jam. 590. Pig. on Recov. 129.

“ —If



“ —If they were of *personal* estate, whether chattels real or  
“ personal, from the nature of the property they could not  
“ be the subject of either fine or recovery.—Entails by exe-  
“ cutory devise being thus exempt from any legal mode of  
“ barring them, it became necessary to prescribe bounds and  
“ limits to this new species of settlement, lest otherwise en-  
“ tails should obtain a longer duration through the irregular  
“ and barely permitted medium of executory devise, than the  
“ law endures, where the entail commences in the regular way;  
“ by creating estates for life and estates tail with remainders over.  
“ Hence originated the rule both at law and in equity, that  
“ the contingency, on which executory devises depend, should  
“ be confined to a stated period; and by analogy to the case  
“ of strict entails, which cannot be protected from fines and  
“ recoveries, longer than the life of the tenant for life in pos-  
“ session and the attainment of 21 by the first issue in tail, it  
“ was at length settled, that the longest period for vesting of  
“ an executory devise should be *any life or lives in being and 21*  
“ *years after*; to which may be added *a few months more for the*  
“ *case of a posthumous child*. Therefore every contingency, which  
“ is not such, that if it ever happens, it must necessarily be within  
“ the period so described, is too remote for an executory de-  
“ vise. The consequence of thus circumscribing the limits of an  
“ executory devise is, that it is not lawful to limit an executory  
“ devise on a *general and indefinite failure of issue*; namely, a  
“ failure of issue of the person named whenever it happens, be-  
“ the time of the event ever so distant. It is equally a conse-  
“ quence of the rule, that if the failure of issue is restrained  
“ to the death of any person or persons actually living, or to  
“ any period not beyond a life and lives in being and 21  
“ years with a few months beyond, then the contingency is  
“ good, and the executory devise has it's full effect. Per-  
“ haps



“ haps if the doctrine of executory devises was *res integra*, and  
 “ was now to be settled, it might be thought a sufficient and  
 “ more just check of them to hold, that they should be good  
 “ as far as the given period, whether the contingency was too  
 “ largely and widely expressed or not. But our ancestors have  
 “ not left us a choice; it having been long a fixed rule, that,  
 “ if the contingency is too remote, the executory devise de-  
 “ pendent upon it shall not be merely void so far as it exceeds  
 “ the line prescribed, but shall wholly fail.”

Now too, I have the satisfaction of knowing, that a great living judge, who is peculiarly conversant in the law of real property, considers the principle of the boundary to executory devise in the same way: for so it appears from the case of Long and Blackhall, which I had occasion to cite from 7. Durnf. and East in the preceding history of executory devise, and which was adjudged as recently as Hilary term last year. The words of Lord Kenyon are these: “ The rules respecting executory  
 “ devises have conformed to the rules laid down in the con-  
 “ struction of legal limitations; and the courts said, that *the estate*  
 “ *shall not be unalienable by executory devises for a longer term,*  
 “ *than is allowed by the limitations of a common law conveyance.*  
 “ In marriage settlements the estate may be limited to the first  
 “ and other sons of the marriage in tail; and until the person,  
 “ to whom the last remainder is limited, is of age, the estate  
 “ is unalienable. In conformity to that rule, the court have  
 “ said, so far we will allow executory devises to be good.”

Fifth inference.

THE NEXT inference which I make from the history of executory devise is, that, as to prevent all material inconvenience from permitting the executory devise of property, our courts have already exerted a discretion in laying down certain rules;  
 so



so it is apparent, that *there is reserved to them a right of further exercising their discretion for the same purpose, whenever cases pregnant with any great evil shall provoke it.* The principle, which, as I have shewn, first generated the introduction and sanction of executory devise, and afterwards limited and controuled it, was *general convenience*; or to use Lord Kenyon's words, *general utility*. Such a principle imports, that to apply the permission of executory devise *against general convenience, against general utility*, is an abuse of the permission. It imports also, that executory devise must continue subject to the controul of the courts: for otherwise the principle might become dormant, and the courts would not be adequate to prevent new abuses, and only those which have already occurred would be checked. To prevent abuse effectually, it is as necessary, that the courts should be armed with authority to stop new abuses in their career, as that the courts should continue the prevention of old abuses. Lord Chancellor Nottingham, the great patron of executory devise, appears in the Duke of Norfolk's case to have so considered the discretion of the courts of Westminster Hall: for this is the amount of his answer to those who asked, where executory devise was to stop; his answer being, as I have already stated at length from his manuscript reports, that it was to stop where inconvenience begins. Also the practice of the Courts from the first introduction of executory devise imports, that their discretion for controuling them was of a *continuing* nature. The present boundary was not the effect of one exercise of discretion; was not the work of one set or of two sets of judges. The limits were from time to time enlarged and contracted, as the cases, which called for judgment and public convenience and public inconvenience respectively demanded: and it is most evident, that the boundary, so far as it has yet proceeded, required much above a



century in the forming (s). Hitherto, indeed, the inconvenience, against which our Courts have been called upon to guard, has been the inconvenience of *perpetuity* of entail, the inconvenience of making property *unalienable* for a longer time than our law endures. But there may be *other inconveniences*, even those of a still higher order; those of even stopping *the use and enjoyment of property*: and when such inconveniences become the subject of judicial examination, there may be, at least as great a demand upon the courts to prevent executory devise from being made a shelter for such abuses, as there ever was a demand to prevent the shelter of perpetuity of entail. How far the present case may fall within the compass of this remark, will be the subject of consideration, when I have made further advance in the argument. Here I only insist, that the whole history of executory devises implies a continuing discretion in judicature to prevent the abuse of them; and that the very principle of executory devises, which is *general utility*, presumes the existence of an active power sufficient to prevent *general inconvenience*.

Sixth and  
last inference.

I HAVE ONE OTHER inference to offer. It is, that during

(s) In a manuscript report I have of the case of Gore and Gore in 1733, when it was for the last time argued in the King's Bench, Lord Hardwicke, then chief justice, even went the length of making out executory devise to be a subject, over which the courts had so much discretion, as to be entitled to *retreat* or *advance* as publick convenience or publick inconvenience should require. His words are thus given.—Indeed “the devise is in favour of a person not born at the time of the devise made. Yet “*posthumous children have the same right to a provision that other children have, and deserve* “the same favour from courts of justice. *None but Treby ever said the time of executory* “*devise was fixed.* Holt held otherwise. And so it appears from many resolutions, “*where the judges have taken a latitude to execute the will of the dead, according to the* “*circumstances of the case; not confining themselves within any determinate bounds, but AD-* “*VANCING FORWARD or RETREATING, JUST AS THEY FOUND IT DANGEROUS OR CON-* “*VENIENT.*” Lord Hardwicke, according to the note I have, followed this with a citation of various cases to prove this doctrine.

the



the progress of executory devise from its infant state to maturity, there has prevailed amongst some of our greatest judges and lawyers a vast jealousy of the liability of executory devise to an abusive application, and a vast aversion to ~~the~~ extending its limits.—In the case of Pell and Brown, which in the 18th of James the First so operated to fix executory devise of inheritance, judge Doderidge inveighed zealously against executory devise as a very dangerous invention, and endeavoured to stop its progress by making it barrable by common recovery, and called forth his deepest learning and his utmost acuteness for the purpose; and his reasoning in this respect will be found fully given in the report of the case by Rolle and Palmer.—In the case of Child and Baily, which came close upon Pell and Brown, being only two years after, the same court of King's Bench, as had but recently allowed executory devise for inheritance, refused it *unâ voce* for a term of years, though the contingency of the limitation over was not more restrained in the one case than in the other, and words of inheritance were equally used in both. Upon error in the Exchequer chamber, their judgment was confirmed by lord Hobart and six other judges out of seven from the Common Pleas and Exchequer. The manner, in which Sir Jeffrey Palmer reports this affirmation, strikingly shews, how very great the apprehension was, that some vast inconveniences would be generated by the allowance of executory devise; for they did not merely condemn the devise in question on account of the extent of the contingency of the limitation over, but expressed themselves, as if there was a repentance of going the length of Lampett's case and Matthew Manning's case and other such cases, which allowed the limitation over of a term after a mere devise for life, observing, that "time had discovered the inconvenience, which such limitations introduce in the common-



“wealth.” The same thing in effect is expressed in Sir William Jones’s report; for he states, that he and the six other judges of the Exchequer chamber, who joined in affirming the judgment of the King’s Bench, said, “that they would not question Lam-  
 “pett’s case and Manning’s case; nor would they extend them  
 “to any other case, which varied from them, nor give any la-  
 “titude to those cases.”—Strong language also against the extension of executory devise came from the judges in subsequent times. Lord Bridgman, whilst chief justice of the Common Pleas, is represented in *Grigg v. Hopkins* 1. Sid. 37 to have expressed himself, as if he doubted, whether if Matthew Manning’s case was to be adjudged again, such a judgment would have been given, adding, that the judges would not extend their resolutions more favourably to such devises.—Language to the same effect, as I have before stated, makes part of the certificate of the three judges, Hyde Twisden and Brown, to Lord Chancellor Clarendon in *Pearce v. Reeve* 13th of Charles the Second.—In *Snow and Cutler* in the King’s Bench 18 Ch. 2. lord chief justice Kelynge and judge Windham, according to the Report in 2 Keb. 11. said, “they conceived, that execu-  
 “tory devises had gone far enough, and it will be dangerous to  
 “go farther.” Something of a similar tendency is attributed to judge Windham in a further stage of the same case in 2 Keb. 297.—So anxious were the three chief justices, who assisted Lord Nottingham in the Duke of Norfolk’s case, to prevent the extension of executory devise, that they refused to terms for years, what they could not deny to have been settled for inheritance. Even Lord Chancellor Nottingham did not claim more for the former than was allowed to the latter.—Nor did the Courts of Westminster Hall, after the revolution, cease to declare against the extension of executory devise. In *Scattergood and Edge*, lord chief justice Treby and judge Powell were  
 loud



loud against extension. None I believe have avowed being favourable to it. Lord Hardwicke himself, and the judges of the King's Bench who joined him in the certificate finally extending the twenty-one years beyond lives in being to the contingency of executory devise of inheritance, expressed themselves on the occasion, as if they thought themselves bound to disavow all intention of extending executory devise. Your Lordship also, in the very recent case of Long and Blackhall, thought fit to shew your jealousy, least executory devise should be extended beyond the established limits; and therefore you would not decree the allowance of time for a posthumous child, where the executory devise began with a child *en ventre sa mere* and comprized the whole life of such child when born, and might in favour of such child's issue have ended as it began, without first having the opinion of a court of law, whether such double allowance for a posthumous child including his life in the first instance was allowable; a point which, however, seems at this moment not to have been fully discussed, and if so not fully adjudged.

SUCH are the inferences, which I make from my own history of executory devise, imperfect as, notwithstanding the labour of extracting it, I feel it to be. Without the fatigue of so journeying to the remote springs of executory devise, and thence pursuing it's course through some of it's principal channels, and so gradually reaching it's present extension, I should not perhaps have been either able or warranted to make such inferences. But I looked for the proper sources of argument against the abuse of executory devise; and I was aware, that I could not find them, without in great measure mastering it's history: and this must be my apology for so large a view, of a most dry, though, in respect of the effect it produces upon the settlement and enjoyment



joyment of property in England, a most interesting subject to English jurisprudence.

Facts, on which, the first general head of arguments against the trusts depends, explained.

I now come to my first general head of imputation, against the trusts, to which the late Mr. Thelluffon's will devotes the grand bulk of his magnificent fortune.

My accusation against the will of the late Mr. Thelluffon in this branch of the argument is, that the beneficial trusts, which the testator appoints to begin when his previous trust of accumulation is reluctantly permitted to cease, and for the sake of protracting which that trust is so anxiously constituted by him, are upon a contingency, with too much of remoteness and latitude for the rule of executory devise.

EXCEPT in the single instance of a will; which came from the hands of an eminent conveyancing lawyer; whose apathy in the close of life preferred engendering a project of accumulation for forensick exercise to a just and honourable distribution of his fortune amongst his relations and friends; but whose vain and fanciful production shrunk into nullity under the manly and instantaneous reprobation of Lord Chancellor Thurlow: never I believe was there an example, of so studied a design of experimenting upon the latitude of executory devise, as appears in the will now in question.

I SPEAK with the exception of the late Mr. Bradley's will; because I consider him as aiming to be the founder of the art of extended



extended posthumous accumulation, and his will as meant to be the chef-d'œuvre of precedent in that way. But with that single exception, thus unsuccessful in the event, such a deliberate tampering with the law of trust and executory devise, in order to combine accumulated with executory devise, to make them commensurate, and to render both subservient to a protracted exclusion of all use of property beyond adding to its own bulk, as the will of the late Mr. Thellusson amounts to, is not, so far as I am able to learn, to be paralleled in the records of English judicature.

NOT content with making it impossible to ascertain the first beneficial devisees of his immense residuary fortune, until the very moment of the happening of the contingency, upon which the trusts for them are to begin to operate;—not content with constituting a trust of accumulation to exclude all enjoyment of the huge mass of his property in the mean time;—Mr. Thellusson, artificially to protract the accumulation, and consequently the executory devises, which are not to commence until the accumulation ceases, selects, not one or two lives, not one or two classes of lives, but a great variety of existing lives, a great variety of classes of lives, and in a manner, which shews, that if he had not been deterred by the fear of outraging the judicatures for executory devise, and perhaps by the prudent discouragement of his professional assistants in the drawing of his will, he would probably have risked going greater lengths.

THUS impelled by the phrenzy of posthumous avarice, the testator Mr. Thellusson grasps no less than *seven classes of lives, for the duration of his accumulating project, and consequently for postponement of the executory devises, which are permitted to commence when the accumulation ceases.*

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THE lives selected for this extraordinary purpose are thus arranged by the testator. That is, he appoints his trust of accumulation to continue during the lives of the following persons, namely,—1. Of his three sons Mr. Peter Isaac Thelluffon, Mr. George Woodford Thelluffon, and Mr. Charles Thelluffon.—2. Of his grandson John Thelluffon, the eldest son of Mr. Peter Isaac Thelluffon.—3. Of such other sons, as Mr. Peter Isaac Thelluffon had or might have, he having at the time of the will two other sons, who are still living.—4. Of such issue, as testator's same grandson John Thelluffon might have.—5. Of such issue, as any other sons of testator's son Mr. Peter Isaac Thelluffon might have.—6. Of such sons, as testator's sons Mr. George Woodford Thelluffon and Mr. Charles Thelluffon might have.—and 7. Of such issue, as such sons might have; the testator adding at the end of this seventh and last class of persons these restrictive words, “AS SHALL BE LIVING AT THE TIME  
“OF MY DECEASE OR BORN IN DUE TIME AFTER.”

NAY, the testator is not satisfied with the lives of all this variety of persons, and the lives and life of the survivors and survivor of them.—He is not satisfied with the variety of classes; thus furnishing six existing lives; and in respect of the testator's being in perfect health at the date of his will and likely to live many years, and of his having three sons married to ladies likely to bear many children, also promising such a successive supply of young lives, as on the supposition of his living only ten years longer might have encreased the six existing lives to twenty or to a much greater number.—He is not satisfied with thus including the lives of persons *in the womb at his death*, or as the words *born in due time after his decease* were probably meant, the lives of all such issue as should be born to his three sons or their sons during *twenty-one years after*, that being the time, which constitutes



stitutes the ultimate allowance beyond lives in being for the contingency of executory devise, and which probably the testator thought fit to consider as the due time for gaining a fresh supply of lives.—Eager therefore to catch at the means of still further protraction to his trusts of accumulation and consequently to the vesting of his executory devises, the testator cunningly takes the chance of a further protraction beyond the last of the existing and expectant lives so anxiously collected to gratify his avaricious ambition. Accordingly the will contains a provision, the aim of which, from the equivocalness of the language, seems to postpone the vesting, until the *actual partition* amongst the three lineal male descendants. The will also contains a provision, which, after reciting that the trustees of the will might not be able immediately to find convenient purchases of land, directs the trustees in such cases to lay out his vast residuary personal estate and the money from the accumulations of his residuary estate both real and personal upon real securities or in the public stocks ; but then instead of ordering, that the interest and dividends should be applied as the rents and profits of the lands if purchased would be applicable, sily requires an *accumulation* of the interest and dividends, in the same manner and for the same purpose as the rents and profits of the lands to be purchased under the trusts are directed to accumulate. This latter provision, I contend, amounts to absolutely forbidding, to the executory devisees, all enjoyment of the income of the residuary personal estate and of the accumulations from that and the general landed fortune of the testator, till lands shall be actually purchased.

HAVING thus analysed this compound of contrivances, to try the extremes of executory devise, and so to pervert an indulgence

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dulgence for general utility into a source of general inconvenience, I shall now specify,—wherein the beneficial trusts in question appear to me challengeable, for excess of the limits prescribed to the contingency of executory devise by the wise policy of the courts of Westminster Hall.

Six distinct  
excesses of  
executory  
devise im-  
puted to  
the will.

IN this respect, I impute, to the beneficial trusts in question, excess of contingency in six different ways.

FIRST, I charge against the will, that the contingency, till the happening of which the beneficial trusts are prevented from beginning, *is partly on a general failure of issue*, or at least includes the lives of *unborn grandchildren of the testator indefinitely*.

SECONDLY, I insist, that the contingency of the beneficial trusts covertly attempts to add, to lives in being, the lives of all such issue of future sons of the testator's two younger sons, as shall be born *at any time within twenty-one years from his decease*.

THIRDLY, I impute to the will, that the commencement of the beneficial trusts is so managed and postponed, as to add to lives in being, *issue in the womb* at the death of the testator, *for a purpose not allowed* by the rule of executory devise, and also in an extent in several respects exceeding the boundary of that rule.

FOURTHLY, I insist, that the will nominates lives for the contingency of the beneficial trusts *in an extent and in a manner not consistent with the true spirit of the rule of executory devise*.

FIFTHLY, I charge it as an excess, that, *in point of effect*, the will continues accumulation, till the lands to be purchased with  
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the residuary personal estate *shall be actually purchased*, whether the lives so anxiously chosen for postponing commencement of the beneficial trusts *are or are not expired*.

SIXTHLY, I contend, that the will aims to protract the vesting of the executory trusts for the three eldest lineal male descendants of the three sons, till the moment of *actual partition* amongst them.

THESE six charges of trespass upon the limits of executory devise I shall consider separately.

THE first excess of the boundary of executory devise, which I impute to the will of the late Mr. Thellusson, depends upon the construction of the restrictive words in the conclusion of his enumeration of the lives for the accumulative trust his will creates.

First excess, namely, in some degree comprehending the lives of future issue generally.

As I have just explained, the will fixes upon seven classes of lives, for protracting the trusts of accumulation and consequently the vesting of the primary beneficial trusts. Of these classes the sixth is made to consist of such sons, as the testator's two younger sons Mr. George Woodford Thellusson and Mr. Charles Thellusson might have; and then the testator makes the seventh class to be "of such issue as such sons may have" adding, "AS SHALL BE LIVING AT THE TIME OF MY DECEASE OR BORN IN DUE TIME AFTERWARDS."

Now if these added restrictive words are construed, as apply-



ing merely to the seventh class of persons to which the words are immediately subjoined, it will leave the *four* immediately preceding classes, unqualified and unguarded in point of time, that is, will let in the lives of unborn sons of testator's eldest son, the lives of the issue of testator's grandson John Thelluffon, and the lives of the issue of the unborn sons of testator's eldest son, and also the lives of the future sons of testator's two younger sons, indefinitely and without restriction of any kind whatever. I say it will leave thus unguarded the *four* classes immediately preceding the seventh class; because as to the first and second of the seven classes, consisting of the testator's three sons and of the testator's grandson John Thelluffon, and indeed as to so much of the third class as consists of living younger sons of the testator's eldest son, these being of existing lives, no restriction was necessary for them.

HERE therefore the point, which I make against the will, is, that it leaves the *third, fourth, fifth, and sixth* classes of lives, or at least the *third* class in which are included Mr. Peter Isaac Thelluffon's future sons, without any limitation in point of time; and so makes the beneficial trusts, which are to succeed the trust of accumulation, dependent upon a contingency beyond the boundary of executory devise, and on that account illegal and void.

THAT if the words of restriction at the end of the seventh class of lives are to be confined to that class only, the third, fourth, fifth, and sixth classes of lives will become too indefinite for executory devise, cannot I presume be denied: because then the beneficial trusts will be an executory devise after determination of the lives of future sons of the testator's eldest son Mr. Peter Isaac Thelluffon at whatever time born, of the lives of all  
issue



issue of the testator's infant grandson John Thelluffon, and of the lives of future sons of the testator's two younger sons.

NOR can it I presume be denied, that if *any one* of the third fourth fifth and sixth classes shall be construed as not reached by the restrictive words at the end of the seventh class, the beneficial trusts in question will depend on a contingency too remote to be valid: for then the third class will take in the lives of sons not in being, and so will the sixth class; and as to the fourth and fifth classes, they will then include the lives of issue generally.

THE matter to be considered, therefore, in this branch of the case is, whether the restrictive words subjoined to the seventh and last class of lives should be applied to that class only, or should be extended so as to cover the four preceding classes. And it is my duty, on behalf of the family of the late Mr. Thelluffon, to contend, that *only the seventh* class of lives is within the restriction, or at least that the THIRD class consisting of Mr. Peter Isaac Thelluffon's future sons is not included.

IN raising this point against the trusts, I am not unaware of the difficulties, which belong to maintaining, that the restrictive words do not give shelter to such of the classes of lives preceding the seventh class as have occasion for it. Nor will I conceal, that I do not myself think it perfectly clear what was the precise extent, in which the testator intended to apply the restrictive words. But, according to my impression, there is more reason to attribute the intention of excluding at least some of the material classes of lives from the restriction, than there is to suppose the contrary. Besides, as I see the case, to make it doubtful, whether the testator did not intend some degree of  
trespass



trespass and irregularity, is at least to endanger the validity of the will: for what favourable interpretation can be expected for testamentary dispositions so harshly and unnaturally eccentric, that the testator himself deemed it necessary to deprecate the legislature against annulling them?

UNDER this explanation, I shall contend, that the restrictive words added to the seventh and last classes of lives should not be construed, as intended by the testator to apply to the four classes immediately preceding the seventh class; and more especially should not be construed to apply to the third class, which includes the lives of future sons of Mr. Peter Isaac Thelluffon.

IN the FIRST place I insist, that the strict rule of construction is with confining the restrictive words to the seventh and last class of lives, which the restriction immediately follows, namely, to the lives of the issue of the testator's two younger sons Mr. George Woodford Thelluffon and Mr. Charles Thelluffon. The seven classes of lives, assumed by the testator for his trust of accumulation, are so many distinct members of the same sentence. All of the classes before the seventh are in themselves without words of restriction. Then comes the seventh class with restrictive words; and these are of such a kind, that they are not in the least necessary to make sense of the six preceding classes of lives. Applying the restrictive words to the lives of the seventh class only amounts to saying, that during the six first classes of lives the accumulation shall operate absolutely and at all events, but that the accumulation shall not be affected by the seventh and last class of lives except conditionally, and under certain circumstances. It is, therefore, as to the six preceding classes, a case exactly falling within the rule,



rule, that words shall relate to the last antecedent, unless it impedes or obstructs the sense. *Proximo antecedenti fiat relatio* is not merely a rule of grammar. It is a rule also of legal construction. The Courts of Westminster Hall have assisted themselves with the rule from very early times. In the year book of 9th Hen. 6. fol. 29. the rule is appealed to in argument, as if the use was familiar: and what is remarkable enough, the rule is there given with its proper qualification; for the words of the book are *ad proximum antecedens fiat relatio nisi impediatur sententia*. Judge Brown, according to Plowden 127. cited the rule in a case of the reign of Philip and Mary. Sir Henry Finch in the reign of James the First transcribes the rule into the early part of his profound discourse on law, and illustrates it by cases extracted from the year books. Attorney General Noy, in his Maxims of Law, which was written in the reign of Charles the First, gives the rule and exemplifies the application in like manner. The same thing is done by Wingate in his book of Maxims, which was published just before the restoration. As to the instances, in which our Courts have acted upon the rule, the case of *indictment* in 9 Edw. 4. fol. 48. a. the case of restrictive words in a *grant* of tithes in Cro. Jam. 48. the case of covenants in Littleton's Reports 80. and the case on *return to a mandamus* in Rep. temp. Holt 449. are all precedents of an application of the rule. If it was necessary, many more instances might I apprehend be collected. But the existence of the rule under the qualification I have stated will scarce be questioned. The objection I presume will be to applying the rule to the present case.

IN the SECOND place I insist, that the language of the will is not such, as even to afford the opportunity of applying the restrictive words at the end of the seventh and last class of lives

to



to the first and second classes, namely, those composed of the lives of the testator's three sons and of the life of his eldest grandson. The restrictive words are, "AS SHALL BE LIVING  
 " AT THE TIME OF MY DECEASE OR BORN IN DUE TIME  
 " AFTERWARDS." To express, that the lives of existing persons should not be lives for the trust of accumulation, unless those persons should survive the testator, was *unnecessary*: for unless they survived him, their lives could not be so applied. To express, that the lives of existing persons should not be counted, unless those persons should be born within due time after the testator's decease, would be *nonsense*. Therefore as to the first and second classes of lives, one part of the restrictive words is nugatory; and it is not possible to apply the other part. Besides, in the description of the two first classes of lives, there is not any word leading to a connection with the restrictive words added to the seventh class. Each of the five classes after the first and second is with the word *SUCH* in the description. Thus the third class is "of *SUCH* other sons AS my said son  
 " Peter Isaac Thellusson now has or may have." The succeeding five classes are with the word *SUCH* in like manner. And though the word *AS* not only satisfies the word *SUCH* without resorting to the restrictive words, but even renders the application of *SUCH* to *AS* a second time in the restrictive words at least somewhat more than the idiom of our language seems to admit; yet I confess, it gives the opportunity of connecting the restrictive words at the end of the last class with the prior classes, if the presumption from the strict rule of *proximo antecedenti fiat relatio* is really overcome by the clear sense of the whole passage. But the word *SUCH* being omitted in the first and second classes, there is almost a negative against connecting it with the words of restriction at the end of the last class; the omission of *SUCH* amounting to a disconnection. However all  
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the use I am entitled to make of this disconnection of the first and second classes from the restrictive words is, that it makes it more natural to understand the testator, as not meaning to extend the restrictive words beyond the class to which they are subjoined. If two of the six preceding classes were intended to be excluded from the restriction, it leads in some degree to the supposition, that the other four were intended to be excluded also. The rule of *proximo antecedenti fiat relatio* being admitted to apply to two out of the six prior classes, it is in itself in some degree a reason for not exempting the other four: because in one and the same sentence to decide, that the rule of relation doth apply and doth not apply, at least demands some special ground to justify the discrimination.

IN the THIRD place, I insist, that there is barely the opportunity of applying the restrictive words at the end of the seventh class of lives to the third class: and that the *letter* of the will is considerably against such an application, and the *spirit* of the will is still more so. The words of the will in describing the third class are, "and of SUCH other sons as my said son " Peter Isaac Thellusson now has or may have." Here the word SUCH in point of structure of language is satisfied by the word AS in the same description: and so the description is complete in itself. Consequently there is no necessity of looking further in the sentence on account of the word SUCH. At the same time I admit, that there is a possibility of applying AS to SUCH a second time, though not quite according to the idiom of our language without an intermediate conjunction. For instance, if the testator had in his will expressly appointed his trust of accumulation to endure "during the lives of SUCH sons " AS his eldest son had or might have and AS should be living " at the testator's death," I should say, that the language was  
M strictly



strictly correct. But if the words were "during the lives of  
 " SUCH sons AS his eldest son had or might have, AS should be  
 " living at the testator's death," I say, that thus applying the  
 word AS, a second time to SUCH without the conjunction *and*  
 intervening, at least approaches to bad English. However in  
 construing the will, this would not be the least objection to  
 giving effect to the second application of the word AS. The  
 objection would be to the propriety of the expression, not to  
 the efficacy of it. Therefore if the restrictive words in ques-  
 tion were literally subjoined by the testator to the third class as  
 they certainly are to the seventh, I should be forced to concede,  
 that they must operate as far as they can. By so subjoining the  
 restrictive words to the third class of lives, it would stand thus  
 described in the will. It would be "of SUCH sons AS my said  
 " son Peter Isaac Thelluffon now has or may have, and AS *shall*  
 " *be living at the time of my decease or born in due time after-*  
 " *wards.*" Then also I should be forced to apply the rule of  
*singula reddendo singulis*; and I should accordingly apply the  
 first part of the restrictive words to the existing sons of Mr.  
 Peter Isaac Thelluffon at the time of the will, and both parts  
 to the future sons. But as the will really stands, the case is  
 widely different. The third class is without the restrictive  
 words subjoined; and between the third class and them there  
 are three other classes; and even each of these is so compleat, as  
 to prevent in point of language all necessity of applying the re-  
 striction at the end of the seventh class to them. The process of  
 construction, therefore, to extend the restrictive words at the  
 end of the seventh class to the description of the third class, be-  
 comes very complicated. The difficulties to be surmounted are  
 three-fold. The presumption from the rule of grammar and  
 of law *proximo antecedenti fiat relatio* is first to be overcome.  
 When that is accomplished, the difficulty of shewing, that the  
 restrictive



restrictive words at the end of the seventh class should not be applied to some of the six preceding classes in the same sentence, and yet should be applied to others, that is, should skip over two classes and then attach upon three, next presents itself, and must be encountered with. Then comes the difficulty, from the double contents of the third class of lives, and from the double contents of the restrictive words; for it is not possible to apply more than one half of the entire restrictive words to one half of the entire third class, in respect that such of the restrictive words at the end of the seventh class, as confine the lives to persons born in due time after the testator's decease, are quite incapable of application to so much of the description of the persons in the third class, as consists of sons *in esse* at the date of testator's will; and so it becomes necessary to divide what according to the language is entire both in the third class and in the restrictive words, and for that purpose to cut the knot by the rule of *singula reddendo singulis*, and through that medium of construction to effectuate an application of one moiety of the entire restrictive words to one moiety of the entire third class. Such an operation in the construction of the will is at least multifariously refined. It is not, therefore, of course to have the benefit of such an elaborate and metamorphosing interpretation. To be entitled to it, very decisive evidence, that it is demanded by the actual intention of the testator, should be extracted from the other contents of the will. But the language of the other parts of the will is I apprehend by no means calculated to give assistance in this respect; and as to the *spirit* of the will, so far as the trusts of accumulation and the beneficial trusts commenceable when the accumulation is made to determine are concerned, it is from beginning to end, as I have before explained, a complication of cruel experiments, sacrificing the testator's whole existing family of wife sons daughters and grandchildren,



dren, and even issue in the third generation, to an unfeeling and absurd vanity, and for that purpose tampering with the extremes of the rule of executory devise and striving to abuse it's indulgence. With the spirit of such a will it is more congenial, to impute to the testator an intention of covertly trespassing on the boundary of executory devise, and to suppose him betrayed by his avaricious vanity into an excess of that boundary, than to suppose him nicely observant of a boundary so obstructive of his general design. At least, a testator ;—who so anxiously tampers with the law of executory devise ;—and who for that purpose in a way not paralleled in the records of testamentary law, in a way not even attempted by the learned essayist in applying executory devise to accumulation so as to make the latter commensurate with the former, the profound Mr. Bradley himself, takes seven classes of lives to work upon ;—and who appears also to be restrained from taking a much larger compass, only by the fear of provoking the rejection of his scheme ;—may, I conceive, be more easily presumed to intend irregularity than to intend the contrary. Against such a testator as the late Mr. Thellusson I say, in the language of a maxim of our law as expressed by Lord Bacon, *verba fortius accipiantur contra proferentem*. In truth the spirit of the will is to apply the means of stretching the law of executory devise. Therefore the spirit of the will, so far from assisting to extricate it from the strict rules of interpretation, tends to provoke the most rigid observance of those rules. When also there is superadded the cruelty of the will towards the family of the testator ; with the aggravation of his appearing affectionately devoted to them to the last moment of his life ; and with the further aggravation of excluding every body dear to him for the sake of an uncertain person, of a generation after his death and probably very long after, for the sake as it were of nobody, for the sake only of  
of



of gratifying an insanity of avaricious ambition ; all this being considered, if there is a doubt about his intention, surely it will be much more becoming to resolve that doubt by disappointing his plan of devoting his great residuary fortune to an unnatural and cruel excess of vanity (which without going further into the case must be the inevitable consequence of not extending the restrictive words to the third class of lives) than by substantiating such a plan to the disinherison of his deceived and injured family.

IN the FOURTH place, I contend, that even as to the fourth fifth and sixth classes of lives, there is not enough to induce a relaxation, from the strict rule of referring to the last antecedent, and of so confining the restrictive words at the end of the seventh class to that class only. But I have dwelt so long upon exempting the third class of lives from the operation of the restrictive words subjoined to the seventh class, and the argument for that purpose is so inclusive of the argument against extending the restrictive words to the fourth fifth and six classes, that no more is necessary for the latter, than to point out wherein the argument for them differs. I make two differences. One of them is, that the fourth fifth and sixth classes of lives are nearer to the seventh class, and consequently nearer to the restrictive words added to it. But this is of small consideration. The other difference is of greater weight. It is, that all the restrictive words are such, as may be properly applied to the fourth fifth and sixth classes, if such was the intention of the testator : for they all consist of unborn issue, namely, of such issue as the testator's eldest grandson might have, of such issue as any other sons of testator's eldest son might have, and of such sons as testator's two younger sons might have ; and consequently,



quently, it is neither nugatory, nor insensible, to confine those three classes to persons living at the testator's death or born in due time after. In respect of these two differences, especially the latter of them, there must be a proportional deduction from the arguments I have used against extending the restrictive words to the third class. But that deduction being made, the remainder of those arguments is fully applicable to the fourth fifth and sixth classes, and I refer to them accordingly. Indeed, as I am at present struck, a more particular consideration of the fourth fifth and sixth classes is the less necessary: because, as on the one hand, if the arguments against including the third class in the operation of the restrictive words are inadequate to prevent it, a part of the same arguments cannot be expected to produce that effect for the fourth fifth and sixth classes; so on the other hand, if there is enough in the arguments to exclude the third class from the operation of the restrictive words, there is a clear excess of the boundary of executory devise, and therefore enough to make illegal and annul the whole of the trusts of accumulation and of the subsequent beneficial trusts, without looking to any other class whatever, or indeed to any other branch of the case.

SUCH are the arguments, which occur to me, against applying the restrictive words at the end of the seventh and last class of lives to any of the preceding classes.

IF they are well founded to the extent of excluding from the restriction all the classes prior to the seventh class, then four out of six classes, namely, the third fourth fifth and sixth, all of which require restriction to keep them within the boundary of executory devise, will become unguarded; and the trusts in  
question



question will be void, not only for constituting executory devises on lives *not in being*, but for so constituting them *on a general failure of issue*.

BUT it is not essential to the overturning of the trusts, on the ground of the insufficiency of the restrictive words at the end of the seventh class of lives, to unguard all such of the six prior classes, as without protection from the restrictive words will let in lives too remote for executory devise. For that purpose it is sufficient to unguard only the third class of lives, and so to let in the unborn future sons of Mr. Peter Isaac Thellusson indefinitely. Whatever also may be the insufficiency of the arguments to unguard the fourth fifth and sixth classes of lives, I am so struck with the cogency of the reasons against extending the protection of the restrictive words to the third class of lives; and now that I have thus minutely laboured this branch of the argument, I so see both the letter and the spirit of the will to be against such an extension; that I very much doubt the propriety of my introducing this first charge of trespass upon the rule of executory devise with any thing like a distrust of being able to prove the imputation.

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THE argument, on my second charge of excess of the boundary of executory devise, lies in a narrow compass.

IN substance the charge is, that the testator *covertly* attempts to extend his trust of accumulation, to the lives of *issue born at any time within twenty one years after his own decease*.

Second excess of executory devise, namely, including lives of persons born at any time within 21 years after testator's decease.

THIS



THIS charge arises from the manner, in which the testator has expressed the latter part of the restrictive words added to the seventh and last class of lives for his trust of accumulation, that is, to the class comprehending the issue of his two younger sons.

BUT to understand the meaning of the seventh and last class of lives, it may be convenient here to state the words of the sixth class, as well as those of the seventh, the latter referring in some degree to the former.

THE words of the description of the sixth and seventh classes of lives, including the restrictive words at the end of the seventh class, are, "and of such *sons*, as my said sons George Woodford Thellusson and Charles Thellusson may have; and of such *issue as such sons may have, as shall be living at my decease, OR BORN IN DUE TIME AFTERWARDS*"

Now the question I make is on the sense, in which the testator meant to use the concluding words BORN IN DUE TIME AFTERWARDS.

IF the testator intended by these words, merely to include such issue of future sons of his two younger sons, as should be *in the womb at his death*, then the objection of extending the *lives* to such issue of future sons of his two younger sons as should be born at any time *within twenty-one years after his death* cannot arise.

BUT it should be recollected, that the boundary of executory devise, as finally extended, and as now understood to be settled, is lives in being and *twenty-one years after*. Hence it is natural to consider the *twenty-one years* as the *due time* after lives in being:



being: and in discoursing on executory devise it is, I believe, quite current to refer to the twenty-one years as the due time after a life or lives in being in that sense.

THIS leads to the consideration, whether the testator in the present case did not really mean to augment his collection of lives for protraction of his trust of accumulation, and consequently of the commencement of the subsequent beneficial trusts, by including the lives of all issue of future sons of his two younger sons born within twenty-one years after his own decease.—If such was his meaning, I conceive it to be beyond doubt, that his intention amounts to an excess of executory devise; and so vitiates all the trusts in question: for though the rule, as for many years past it has been enlarged, allows twenty-one years beyond lives in being, yet it doth not allow *the twenty-one years as a time for multiplying lives to extend executory devise upon.*

My grounds, for imputing to the testator, an intention of taking the twenty-one years as a space for accumulating new lives to protract his executory devise, are these.

THE testator cannot be supposed to have had any reason to refer to the birth of the issue of future sons of any of his sons within due time after his own decease, except *with a view to the boundary of executory devise*, and thereby to give some further extension to his trust of accumulation. The reference could not be, with a view to the due time for the birth of a posthumous child in respect of *legitimacy*: for the reference is to the birth of the children of others; and as to the legitimacy of such children, whether they were born within nine or ten months after his decease, or at the remotest time possible,

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was



was perfectly immaterial. Nor could the reference be *with a view to the BENEFIT of issue born to future sons of any of his sons in due time after his decease*; because it is the professed purpose of the reference to such issue, that the trust of accumulation should be extended to *their exclusion*. It being then the testator's object, in making the reference, to extend the trust of accumulation, and through that the beneficial trusts necessarily allowed to commence when that expired, it was natural, that he should look to the twenty-one years allowed to executory devise beyond lives in being. His anxiety was apparently to gain a new succession of lives for his absorbing trust of accumulation. From the beginning to the end, his trust of accumulation is an experimental tampering with the rule of executory devise, in order to elude the real principle of its limits, without incurring the penalty of exceeding them. In such an enterprize, to convert the *letter* of the doctrine of executory devise into a shelter for *abuse of its real spirit*, the insertion of words, merely to secure the lives of children in the womb at the testator's death, was scarce an object large enough for such a testator. Besides if posthumous children may be made use of, for the mere purpose of extending executory devise during the *life* of a child in the womb at a testator's death (which those looking no further than the *letter* and *surface* of executory devise may be apt to suppose, but which is a latitude I cannot concur in) it was unnecessary to mention the posthumous issue of future grandsons. If posthumous children may be so introduced into an executory devise, which I shall presently controvert, no special words were requisite; for where the posthumous child is admissible under an executory devise, he comes in as a child *in esse* by the construction of law. But if the testator meant to take the benefit of the twenty-one years after lives in being, which



is the due time beyond such lives, special words for that purpose were required: and it was natural, that a testator so eager, as the late Mr. Thellusson was, to protract his trust of accumulation and his succeeding executory devises, should not only grasp at taking benefit of the twenty-one years in the most extensive way; but should be betrayed,—into an excess in the *manner* of applying the twenty-one years;—into the excess of taking the twenty-one years for the generation of new lives and for protraction of the contingency of executory devise, instead of merely adding the twenty-one years to existing lives. It is also to be considered, that, without understanding the late Mr. Thellusson by the words *born within due time after his death* to mean the *twenty-one years*, it is scarce to be accounted for, that he should extend his comprehension of issue born in due time after his death to the issue of his *future grandchildren*: for it was at least very extravagant, more especially in a person so conversant in calculating lives as the late Mr. Thellusson was, to suppose, that a man of above sixty years of age should live long enough, not only to see future grandsons married and having issue, but to see such issue of future grandsons also married and parents of children.

TAKING therefore into consideration,—that the testator was tampering with the law of executory devise to stretch its limits to the utmost, in order to serve his vain and odious project of sacrificing all his existing family to a trust of accumulation for raising monstrous fortunes for future male descendants:—that he was seeking to grasp at as many lives to protract such his proud trust of accumulation, as could be collected, without a gross avowal of meaning to abuse the indulgence of executory devise:—that it was natural for such a testator to take the fullest advantage of the twenty-one years allowed to executory devise beyond lives in being:—that unless he is under-



flood to point at twenty-one years after his death, he has taken no advantage of the twenty-one years beyond lives in being:—that it is usual to look to such *twenty-one years* as the due time for extending executory devise beyond existing lives:—that unless he is understood by the words *born in due time after his decease* to point at *twenty-one years*, he not only has omitted to take any advantage of that latter link in the chain of executory devise; but, though above sixty years of age, must be understood to suppose he should live to see the issue of future grandsons married and having issue in the womb:—taking, I say, all this into consideration, I submit, that the testator should be construed, to comprehend, within his multifarious classes of lives, *the lives of issue born within twenty-one years after his decease*; and that in consequence of such an extension of his trust of accumulation, all the subsequent and dependent executory devises become an excess of the limits of executory devise, and on that account the whole is against law.

I ALLOW, that the excess thus imputed is merely constructive. I allow also, that in the case of wills in general it might be too much, thus argumentatively to impute an illegal intention to a testator, to impute it upon grounds which however probable are not quite decisive: and that on the contrary it is in general the office of judicature, to labour at saving an executory devise by the most favourable construction. But the present case arises on a devise, which,—from its unnatural harshness to the whole existing family of the testator,—and from the monstrousness of the testator's project of sacrificing every body for the sake of nobody, and of constituting a precedent of accumulating at least of the most injurious tendency to the interests of the commonwealth,—ought to be construed by judicature in a manner the most unfavourable to the views of the testator; ought to be considered with every  
pre-



presumption against those views; and ought to be as singularly and harshly construed, as it is singularly and harshly fabricated.

MY THIRD charge, against the trusts, for excess of the boundary of executory devise, is on the supposition, that the late Mr. Thellusson, in comprehending for his trust of accumulation the lives of *issue born to the persons described by him in due time after his decease*, did not mean, as I have contended, *twenty-one years* afterwards, but merely meant *issue in the womb at his death*. In this latter sense of the words, by which the testator includes the lives of issue born to *other persons in due time after his own decease*, my objection to his including such lives is, both to the *nature of his purpose* and to the *extent* of it.

Third excess of executory devise, namely, one, by so managing, as to have the nine or ten months for posthumous children twice over, and in the first instance the lives of such children besides.

WITH respect to the *nature of the purpose*, for which the late Mr. Thellusson includes issue in the womb at his death, I have already had occasion to state, that the extension of the contingency for executory devise, from a life in being to the further time allowable for birth of a posthumous child, was disputed some years after the revolution; and not only that such an extension was denied by Lord Chief Justice Treby, in Luddington (t) and Kime 10. W. 3. and about two

or

(t) The case of Luddington v. Kime as stated in 1 Lord Raym. 203. was on a devise of land to Evers Armyn for life without impeachment of waste; and in case that he should have any issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then to Sir Thomas Barnadiston nephew to the devisor and his heirs. The words of Lord Raymond, where he states the opposite opinions of Judge Powell and Lord Chief Justice Treby on the point of executory devise made in that case, are as follow.

“ Objection. It was objected at the bar, that it was the devisor’s intent, that every issue male of Evers Armyn should take. *But if the court construe this a pur-*

“ *chase*



or three years after in Scattergood v Edge ; but that the extension, coupled with the time for the unborn child's attaining 21, was not quite settled 'till the year 1733 by the certificate

“ *chase in the issue male, then a posthumous son of Evers Armyn cannot take : for if he could*  
 “ *take, it must be either by way of contingent remainder, or of executory devise.*  
 “ *Not the first, because the remainder will not vest before the particular estate de-*  
 “ *termines, viz. before the death of Evers Armyn. And executory devise it cannot be*  
 “ *to such a posthumous son, because it will not happen within the usual time allowed for ex-*  
 “ *ecutory devises to take effect, which is but the space of the life of one man then IN ESSE ;*  
 “ *but this would be too long a time being after the death of Evers Armyn :*

“ *Answer. But to this objection Powell justice said, that there were two sorts of*  
 “ *executory devises. The one, where the entire estate passes out of the devisor, as*  
 “ *2. Cro. 590. Pell and Brown's case 2. Ro. Rep. 217. (which Treby chief justice*  
 “ *said was properly the executory devise.) The second sort is a sort of future de-*  
 “ *vise, in which in the mean while the lands descend to the heir of the devisor, as*  
 “ *Hainfworth and Pretty's case 3. Cro. 319. and the time allowed for such to take*  
 “ *effect was no more than one life then IN ESSE. But Powell said, if this had been a de-*  
 “ *vise to Evers Armyn for life, and if after his death he should have a posthumous son born*  
 “ *by his wife then to such son and his heirs ; and if not, then to Sir Thomas Barnadiston*  
 “ *in fee ; he was of opinion, that if Evers Armyn in such case should have a posthumous son,*  
 “ *he would have taken by way of executory devise : for though this would not happen within*  
 “ *the life of Evers Armyn, yet, HAPPENING SO SHORT A TIME AFTER THE DEATH*  
 “ *of Evers Armyn, AS IT MUST BE to be the son of Evers Armyn, he was of opinion,*  
 “ *that this would have been a good executory devise. But Treby chief justice doubted*  
 “ *much of that, and was of opinion, that THE TIME ALLOWED FOR EXECUTORY DE-*  
 “ *VICES TO TAKE EFFECT OUGHT NOT TO BE LONGER THAN THE LIFE OF ONE*  
 “ *PERSON THEN IN ESSE : and so it was held in Snow and Cutler's case. But in this*  
 “ *case the whole court was of opinion, that this was a contingent remainder to the*  
 “ *issue of Evers Armyn in fee ; and therefore a posthumous son could never take for*  
 “ *want of a particular estate to support the remainder\* UNTIL HE CAME in esse.*  
 “ *And if the limitation had been to the first son, it had been the same thing, FOR*  
 “ *A POSTHUMOUS CHILD THERE COULD NOT HAVE TAKEN ; and though the in-*  
 “ *tent of the testator might be otherwise, yet his intent could not controul a rule of*  
 “ *law so strongly established, that a contingent remainder ought to vest during the*  
 “ *particular estate, or eo instante it determines. And for these reasons all the court*  
 “ *held, that Evers Armyn took an estate for life, by this devise, remainder contin-*  
 “ *gent to his issue male in fee.”*

\* This was about two years before the statute of 10. and 11. W. 3. providing for such a case.



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of the King's Bench in *Stephens v Stephens*. However I agree, that since the year 1733 the point has been so far at rest, as to leave no room for now arguing against adding, either the twenty one years beyond lives in being, or the proper and legal time for the birth of a child *en ventre sa mere*. But then I contend, that this addition of the time for birth of a posthumous child is only allowable, to give effect to a devise in favour of such child, or at least to give effect to a devise to some other person in the event of his being born or of his not being born. In general this extension of the indulgence of executory devise to a child in the womb and to a child unborn generally has been for the sake of the child himself. So it was for a child unborn in that very case of *Stephens and Stephens*. So it was for a child *in the womb* in *Snow and Cutler* soon after the restoration, as appears by *Levinz* and the other reports of that case. So it was for a child *unborn* in *Gore and Gore* before the King's Bench in 1722 and 1733. If there be any cases, in which the extension of executory devise, either to a *child in the womb*, or to an unborn child of a living person generally, has been allowed for the benefit of third persons, it is for the gentlemen on the other side to collect and cite such authorities. I will only say, that I protest against considering the case of *Gulliver and Wicket* in 1. Wils. 105. as being an adjudication to that effect, for in that case no posthumous child was born. But I will suppose, that the extension may be applied to effectuate a provision for some other person; as where the executory devise is to A, but in case of his A's dying without a child living at his death or born to him in due time after, then to B. At least I will not now assert the contrary. For the present, therefore, I will suppose, that exceeding lives in being and twenty one years after, by addition of the time for birth of a posthumous child,

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is allowable, that is, that the extension of the birth of a posthumous child may be applied to effectuate a provision either for such child or for some other person. But the purpose, for which the late Mr. Thellusson comprehends issue in the womb at his death, is quite of another kind. It is not to make provision for the posthumous child. Nor is it to make provision for any other person in the event of there being such a child or in the contrary event. But the intent of the testator is, *to exclude the posthumous child from enjoyment of the devised property, and also to prolong the exclusion of every other person from such enjoyment*; and his purpose merely is to prolong the term of accumulation, and so as to eke it out beyond lives in being. In other words, it is merely to enlarge the trust negating all beneficial enjoyment of the property, and so to postpone both the executory devises themselves and the ascertainment of the persons intended to take under them. But I beg leave to say, that this is *an abuse of the extension of the contingency for executory devise as to the time for birth of a posthumous child*; and I beg leave to say, that *extension of executory devise to the time for birth of a posthumous child was not conceded for such a purpose, was not conceded to make a posthumous child an instrument of posthumous accumulation*, and consequently is not applicable to such a purpose. Therefore though the late Mr. Thellusson had merely introduced a posthumous child, under the qualification of only adding, to the term of his trusts of accumulation, nine or ten months beyond lives in being, I should insist, that for such a purpose the extension is not allowable to him. In this instance of the time for birth of a posthumous child, as indeed in the whole system of executory devise, the indulgence was granted in the way of general accommodation for purposes of general convenience: and to apply such an indulgence for the mere gratification



tification of a posthumous selfish vanity and the consequential exclusion of all beneficial enjoyment of the devised property, is to convert an enlargement of the time for keeping property unalienable into an enlargement for making it unusable.

BUT I do not merely object to the *nature* of the purpose for which the late Mr. Thellusson introduces posthumous children. I object also to the *extent* of that purpose; to the extent in which he makes use of posthumous children.

THE extension, allowed by the Courts to the case of a posthumous child, proceeds on the supposition of only adding *nine or ten months* after a life in being as a last or further link to the chain of executory devise, that is, the time allowed by law for a woman's going with child after her husband's decease. To that effect is the language of Lord Kenyon in the case of Long v. Blackall and others, which I have before cited from 7. Durnf and East 100. for his words are, "it is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being and 21 years, and *the fraction of another year allowing for the time of gestation.*" But the late Mr. Thellusson is not content with the *fraction of a year* for the birth of a posthumous child. *He first takes that fraction; and then he superadds the life of the posthumous child, as a new life for prolongation of his trust of accumulation and consequently of his executory devises.* In other words, first he takes lives in being; next he takes the nine or ten months after his own death for the birth of a posthumous child; *and then he takes the life of the child so born after his own decease.* Even this is not the full extent of the cunning of the testator. This supposes the gain of the life of one posthumous child only, that is, one posthumous life, or in case of twins two posthumous



posthumous lives. But, unless the restrictive words of the will, confining the lives of unborn issue to persons living at the testator's decease or born in due time afterwards, are to be considered, as guarding all such of his seven classes of lives of accumulation as require to be within protection of the restrictive words, namely, all the classes after the first and second, the trust of accumulation and all the subsequent beneficial trusts must fall to the ground for excess of the due boundary of executory devise, independent of the particular objection of including posthumous children. Here consequently, I have a right to argue upon the will, as intended to comprehend the posthumous children of all of the various persons described in the third and four following classes of lives. But such a comprehension tends wonderfully to multiply the lives through the medium of posthumous issue. In that construction of the will, the testator must be understood to aim at *gaining posthumous lives, for prolongation of his trust of accumulation, and consequently for postponement of the dependent executory devises, not from one person only; not merely from two or three persons; but from three existing sons and three existing grandsons, and also from all such issue of any of the same sons and grandsons as should have issue in the womb at his decease,* without any other limitation, than what necessarily arises from the making nine or ten months after his death the ultimatum of the time for lives of posthumous issue. In this way, then, the indulgence of nine or ten months, for the gestation of posthumous issue of one person, would not only become extended into the further allowance of such one person's posthumous issue; but such extended allowance would become multiplied into an allowance of the lives of posthumous issue from six existing persons, and also from an indefinite number of persons not existing but possible to have been  
born



born and to have had issue in the womb at the death of the testator. To such a monstrous latitude would it lead, if the late Mr. Thelluffon was intitled, so to protract his trust of accumulation, by superadding the lives of posthumous persons!

THUS stating the extraordinary purpose, for which the late Mr. Thelluffon's will calls posthumous persons in aid of his trust of accumulation; and that such purpose is, not to admit either them or any others, into the beneficial enjoyment of his property, but to make the posthumous persons mere instruments for lengthening the period of exclusion of all mankind from such enjoyment: and thus stating also, that the extent of that purpose goes the length, of not merely including the nine or ten months for gestation of a posthumous child, but of adding the whole life of such child, nay, of adding the lives of posthumous children from six different persons and from issue of those same persons: I really cannot conceive, how it is possible, that either the unmeritorious purpose of the testator in resorting to the birth of posthumous issue can be brought within the reason of the extension of executory devise 'till the birth of a posthumous child; or that even for a meritorious purpose, so adding to lives in being the lives of the posthumous issue of one person, and much less the lives of the posthumous issue of many persons, can be shewn to be within the meaning of that allowance.

BUT not even all this is quite the extent of the use the late Mr. Thelluffon makes of posthumous issue: for his will is so constructed in his executory devise, as notwithstanding it's extravagant purpose to have the allowance of the time for birth of posthumous children *twice over*. This will appear from attending to the artful manner of the will in this



respect. His trust of accumulation is so formed upon the basis of his seven classes of lives, as to begin with the benefit of the nine or ten months for gestation of posthumous children; for, in order to add to lives in being at his death the lives of a new generation, he comprehends such issue of the various persons he means to describe, as should be born within due time after his death. Consequently, he begins with taking benefit of the nine or ten months for the birth of a posthumous child. Nor is this all. He begins his taking the nine or ten months; with a reference to the posthumous issue, not of one person or of two persons, but, as I have already explained, of six existing persons, and of an indefinite number of additional persons possible both to be born and to have issue between the date of his will and the day of his death; and also with a view to gain a new succession of lives, for protracting his trust of accumulation and inclusively his executory devises. The testator doth not indeed expressly claim the benefit of the nine or ten months for the birth of posthumous issue, after the determination of the last of the numerous lives, which he selects to postpone actual enjoyment of the devised property. But the substance of the case is the same, as if he had expressly made such a claim. It required no language from the testator to let in the posthumous issue, being male descendants of his three sons at expiration of the trust of accumulation. The rule in favour of posthumous children operates of course, that is, lets in the child *en ventre sa mere*, more especially, if there is no other child to take. Accordingly Lord Chancellor Thurlow in *Clarke v. Ball* 2. Bro. Cha. Cas. 320; so considered the doctrine; though in that case there were other children, and the question was only, whether the posthumous child should take with the others; and though also the bequest was to children living,



living at the death of the testator. Indeed the opinion of Lord Kenyon in *Cooper v. Forbes* in 2. Bro. Cha. Cas. 63. seems to the contrary, where special words confining the legacy to persons living at the death of the person named are used. But, even with such special language, it appears to be now settled by the case of *Doe on the demise of Clarke v. Clarke* and others 2. Hen. Blackst. 399. that the children *en ventre sa mere* when born shall be permitted to share with children living when the devise takes effect. The present case then is tantamount to taking advantage of the time for birth of a posthumous child, both *at the beginning* of the time for the contingency of the executory devise, and *at the end* of it. On the one hand, to increase the late Mr. Thellusson's stock of lives for feeding his trust of accumulation, his will expressly assumes the time for birth of posthumous children in the outset. On the other hand, his will constructively gains the same time at the expiration of the last of the lives, that is, the law allows to the will to let in children in the womb, if there should be no persons ready to take as male descendants of the three sons.

IN this branch of the argument, then, it becomes a question in the present case, whether the testator, by grasping at the nine or ten months for a posthumous child at the beginning of his trust of accumulation, in order *to gain a new flock of lives* and *to double the nine or ten months*, which it is of course to allow at the end of the same trusts, has not trespassed upon the rule of executory devise.

Now as to this point of adding the allowance for birth of posthumous children, to lives in being twice over, even upon the supposition of it's being the naked case of an executory devise, beginning with a posthumous child, and ending with  
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one, I should contend, that thus taking the time for birth of a posthumous child twice over was a clear excess of the settled boundary of executory devise. Ever since the case of Stephens and Stephens adjudged, as I have before stated by the King's Bench in 1733, the boundary of executory devise has been universally described as a life or lives in being and 21 years after, with the further allowance of due time for birth of a posthumous child, that is, nine or ten months. So, as I have already mentioned, Lord Kenyon described the boundary of executory devise in the late case of Long and Blackall. This is indeed so universally understood, as to be part of the decantatum of the rule. But if the time for a posthumous child is to be allowed, first at the beginning of the contingency for executory devise, and then a second time at the end of it, the *nine or ten months* will be increased to *nineteen or twenty months*. In other words a new link to the chain of executory devise will be gained. It is to be considered also, that even the smallest extension of the boundary may be of dangerous consequence: for if the 9 or 10 months may be made nineteen or twenty, it will be a precedent for a still further exceeding, and there will be no saying what is the boundary. Nor should it be forgotten, that indeed the courts are in a manner pledged not to admit any further enlargement of the rule. Accordingly I observe, that Lord Mansfield in the case of Goodman v. Goodright, which was before the King's Bench in Mich. Term in the 33d year of the present King, but is not in print, pointedly declared, that he so considered the matter. I say this, upon the authority of a note, taken of the argument in that case, by a distinguished lawyer of the present age, though greatly to the loss of his country, one long retired from all practice. It is almost unnecessary to say, that I mean Mr. Francis Filmer.



Filmer. According to his note of Goodman v. Blackman, which was a case involving a point of executory devise, Sir Fletcher Norton, in arguing against the validity of the limitations of the will in that point of view, observed, that it was going further than the case of Stephens and Stephens; and that in that case executory devise was extended *to the utmost*, and that it was with reluctance the King's Bench certified in that case conformably to the case of Taylor and Biddal. In *this* part of the argument Lord Mansfield interposed with these striking words: "That point is well settled; "and a life and twenty-one years after is the *utmost extent* for "an executory devise; and is no more than the common law "allows in legal limitations, which restrains the heir from "aliening till twenty-one." This passage, from that enlightened and most eloquent Judge, Lord Mansfield, is, I conceive, applicable against extending the 9 or 10 months to 19 or 20 months. It shews, that such an extension, though only of a few months, is not to be tolerated; because it is beyond that, which is the utmost extent for executory devise. At the same time it significantly refers to the principle, on which that utmost extent is made the extreme of the boundary, namely, that to go further would be allowing to the irregular and indulged mode of entail by executory devise, what cannot be accomplished in a regular course of settlement by remainders.

UNDER these views of the manner, in which the will of the late Mr. Thellusson applies issue in the womb to protract his plan of executory devise and the concomitant accumulation, I submit to your Lordship, that in this instance alone there is a complication of sin by him against the rule of executory devise.—I submit, that he abuses the indulgence of the rule  
by



by applying that time, which our courts granted beyond a life in being for the benefit of a posthumous child, to the exclusion and disinherison of him.—I submit, that he aggravates this abuse of the indulgence of the rule, by so offending against it, not for the sake of any predilection for, or to let in others, but for the unfeeling purpose of extending his plan of accumulation, in exclusion of all the world from the least use of the devised property.—I submit, that he complicates this aggravated abuse, by involving in its destructive purpose, not merely the child in the womb to one person or two persons of his own blood, but children in the womb to many persons being his own issue, to sons, to grandsons, nay, even to issue of grandsons.—I submit also, that he adds, to the abuse thus complicated and aggravated, a gross violation of the rule, by converting an allowance of 9 or 10 months for the birth of a posthumous child, into an allowance for the whole life of such child.—I submit too, that he complicates this excess also by grasping, not merely at the life of a child or children in the womb of the wife of one person, but at the lives of children in the wombs of the wives of many persons, of the wives of his sons and grandsons, and even of their issue.—Further I submit, that to complete this aggregate of excess of the rule, he takes the chance of having, at the end of the lives of his stock of unborn persons, that allowance for the birth of posthumous children, which, as the rule is settled, belongs of course, in the close of executory devise, in favor of issue of the persons on whose death the particular executory devise is made to begin.

Case of Long  
v. Blackall  
considered,  
and question-  
ed.

BUT here I must expect to be reminded of the late case of Long v. Blackall, which, as I have before mentioned, was sent by your Lordship for the opinion of the King's Bench,



and is reported both in 7. Durnford and East, and in Mr. Vesey's third volume. I must at the same time expect to be told, that the certificate of the King's Bench, in that case, sanctions Mr. Thellusson's will in treating children in the womb at the testator's death as lives in being within the rule of executory devise, and also in taking the allowance for posthumous children twice over.

THIS case of Long and Blackall, I do confess, very much clashes with my manner of arguing against Mr. Thellusson's pressing the lives of issue in the womb, at his death, into the service of his executory devise. It is, I acknowledge, a very serious drawback upon me; one, which, in respect of the high authority of the adjudication, and in respect of the sincere reverence I have for the Judges of the King's Bench, and in respect also of the little weight one of my vast inferiority can expect to have in questioning what has been done by persons of so high a description, puts me into a situation very distressing; more especially as I am now speaking before, and your Lordship is now assisted by, one of the very learned Judges, who joined in deciding for the executory devise in Long and Blackall.

BUT though I severely feel the immense disadvantage, with which I have thus to contend in this very material part of the argument; and though I lament this, not only on my own account, but for the sake of the great interests, publick as well as private, which, as I conceive, are at stake in these causes on the will of Mr. Thellusson: yet I am at the same time most strongly impressed, both that *the decision in Long and Blackall is open to a variety of the most serious objections;* and that *even on the supposition of its being above all exception, it*

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will



*will not nearly reach the extensive complication of tampering with issue in the womb, as practised to protract the executory devise now in question.* In other words, my duty as an advocate upon the present occasion extorts from me the most explicit avowal, as far as the homage, due from one destined to continue a mere nobody in our profession towards those who are elevated into almost the pinnacle of judicature, will permit me to declare myself, that, according to my humble apprehension of the subject, after repeated study of it, *the adjudication in Long and Blackall ought not to rule the present case, either in point of AUTHORITY or in point of APPLICABILITY.*

THE case of Long and Blackall arose on the will of a Mr. Blackall. The devise in effect was of a lease for years to trustees, in trust for testator's son, Thomas Blackall, for his life; and after his decease, in trust for such issue male of him, or descendants of his issue male, as at the time of his death should be his heir; and if at the time of Thomas's death there should be no such issue male, or descendants of issue male, then living, then in trust for testator's son, George Sawbridge Blackall, for his life; and after his decease in trust for such issue male of him, or descendants of his issue male, as at his death should be his heir: and if at the time of his death there should be no such issue male, or descendants of issue male, then living, then in trust for the child with which testator's wife was then *ensient*, if the child should be a son, during his life; and after his decease, in trust for such issue male, or descendants of his issue male, as at the time of his death should be his heir; and if at the time of the death of such child, there should be no such issue male, or descendant of such issue male, then living, or if such child in the womb should not be a son, then in trust for such persons as should then be testator's legal representatives.



representatives. The child in the womb at the time of the will was born after the testator's decease, and was a son. The two sons, living when the will was made and when Mr. Blackall the testator died, and also the third and posthumous son, died without leaving issue. Then two questions arose. One was, whether the limitation over to such persons as were the testator's legal representatives was good. The other was, who were entitled under that limitation. On these questions your Lordship saw so much of objection to the remoteness of the ultimate limitation, in respect of the intervening life of the posthumous son, that you thought fit to send it as a question for the opinion of the Court of King's Bench. The result was a certificate of the King's Bench, that, in the events that had happened, the ultimate limitation or trust was a good executory devise. In consequence also of this certificate, your Lordship found it necessary to decide upon the secondary and consequential question, namely, who were meant to take under the description of persons being the testator's legal representatives when all the preceding trusts determined: and after much argument, your Lordship held the next of kin, according to the statute of distribution, to be the persons intended.

SUCH having been the case upon which the Court of King's Bench certified in *Long v. Blackall*, I do agree, that it is natural to consider their certificate as a decision, that the time for a posthumous child is allowable on executory devise, both in the beginning of the contingency and at the close of it, and for adding the life of a person in the womb at the death of a testator to a life in being: for otherwise the ultimate trust of the lease for years, devised by the will in that case, most undoubtedly could not have been supported as a good



executory devise. But since publication of the printed Report of the argument on the case in the King's Bench, I have very much doubted, whether the point did receive a full and complete decision. If the point was determined, the effect is to increase the allowance of *nine or ten months* beyond a life to *nineteen or twenty months*, that is, to nine or ten months before the beginning of the life, and nine or ten months after its expiration: and to try that very point was, as I understand, the real object of sending the case to the King's Bench for their opinion. But from the printed report of the argument in the King's Bench, it seems as if some how or other the effect of beginning executory devise with the life of a person in the womb (which is not only doubling the allowance of the nine or ten months for birth of a posthumous child, by expressly taking that time at the beginning of the contingency of the life named, which constructively is allowed at the close of the same life; *but is liable to the objection of adding the life of a person in the womb, at the death of the testator, to the life of an existing person*) had escaped attention. At least such an effect is not adverted to by the counsel. So far also was Lord Kenyon, in giving his opinion, from expressing himself as if he was giving the allowance of nine or ten months for a posthumous child twice over, that is, as extending the nine or ten months to *nineteen or twenty months*, and inclusively adding the lives of posthumous persons to the lives of persons existing, that he concludes with stating it to be the established rule, to limit executory devise to a "life or lives *in being*, and 21 years, and *a fraction of another year* allowing for the time of gestation."

With respect to the effect of the case of Long v. Blackall, if it is to be considered as an adjudication reaching the whole length



length of the point upon which your Lordship meant to be advised by a Court of Law; if it is to be looked upon as any thing more than a decision affirming the allowance of the legal time for the birth of a posthumous child beyond a life or lives to executory devise, I beg leave to controvert the grounds of the decision. I do this with less scrupulosity; because your Lordship was so struck with doubts on the case, as to require the assistance of the Judges of the King's Bench. I am the less scrupulous also, because, notwithstanding the case's coming for argument under such high sanction, it somehow or other happened, that the Court, after hearing the argument of the very learned Counsel for the executory devise, so declared in favor of it, before hearing what could be said on the other side, as to induce the Counsel against the executory devise, notwithstanding his acknowledged talents and extensive knowledge, to decline the argument, under an impression, which was very natural in a modest advocate, that he should not be able to change the opinion thus early avowed by the Court.

My objections to the authority of this case of Long v. Blackall, considered as deciding the points meant to be referred, are various.

FIRST, I humbly contend, that the decision adds *nine or ten months to the boundary of executory devise*, as it is commonly stated. It is quite a decantatum, not only of our writers on the law of executory devise, but of our Courts, ever since extending executory devise to 21 years beyond lives in being, that it must be within lives in being and 21 years, including the *fraction of a year*, as the legal time for birth of a posthumous child. But the executory devise, upon which your  
Lord-



Lordship thus fought the opinion of the King's Bench, began with expressly taking this fraction of a year; and the rule allowing a like fraction and for the like purpose at the end of the life named, to let in the tenant for life's issue, the executory devise could not, I conceive, be good, without holding that the fraction of the year was allowable *twice over*, that is, without enlarging the *nine or ten months* into above a *year and an half*. Allow me, my Lord, to say, that thus converting two into one, operates upon my mind, not by conviction, but magically. Allow me to say that I feel it, not as plainly construing the rule of executory devises, but as indulging a fiction upon it; a fiction which, though allowable in certain special cases, *to prevent the exclusion of posthumous children contrary to the intent of a testator, or to effectuate some other good purposes*, should not, I humbly conceive, be allowed merely to protract executory devise beyond the plain boundary fixed by the Judges themselves (*u*). Besides, my Lord, I ask for the autho-

(*u*) The fiction of considering children *in the womb*, as children *in being*, for some special purposes, and more particularly *for their benefit*, may be traced into the Roman law as promulged by Justinian. It is expressed in the following passages extracted from his *Corpus Juris Civilis*.

DIGEST. LIB. I. TIT. V. DE STATU HOMINIS L. 5. MARCIANUS  
lib. 1. Institutionum.

S. 2. *Ingenui sunt, qui ex matre libera nati sunt: sufficit enim liberam eo tempore quo nascitur, licet ancilla concepit; et è contrario, si LIBERA CONCEPERIT, DEINDE ANCILLA PARIAT, PLACUIT, EUM, QUI NASCITUR, LIBERUM NASCI. Nec interest justis nuptiis concepit, an vulgo; quia non debet calamitas matris nocere ei, qui IN VENTRE EST.*—S. 3. *Ex hoc quæsitum, si ancilla PRÆGNANS MANUMISSA SIT; deinde ancilla postea facta, aut expulsa civitate, pepererit; LIBERUM AN SERVUM PARIAT? Et tamen rectius probatum est, LIBERUM NASCI, ET SUFFICERE, QUI EN VENTRE EST, LIBERAM MATREM VEL MEDIO TEMPORE HABUISSE.*

IBID. L. 7. PAULUS lib. singulari de portionibus, quæ liberis damnatorum conceduntur.

QUI IN UTERO EST, PERINDE AC SI IN REBUS HUMANIS ESSET, CUSTODITUR, QUOTIES DE COMMODIS IPSIUS PARTUS QUÆRITUR: QUANQUAM ALII, ANTEQUAM NASCATUR, NEQUAQUAM PROSIT.

IBID.



authorities upon which nine or ten months are thus extended into eighteen or twenty. I could not easily be reconciled to such a process by any number of authorities. But I am yet to

IBID. L. 26. JULIANUS, lib. 69. *Digestorum*.

QUI IN UTERO SUNT, IN TOTO PENE JURE CIVILI INTELLIGUNTUR IN RERUM NATURA ESSE. *Nam et legitimæ hereditates his restituuntur. Et si prægnans mulier ab hostibus capta sit, id, quod natum erit, postliminium habet. Item patris vel matris conditionem sequitur. Præterea, si ancilla prægnans surrepta fuerit, quamvis apud bonæ fidei emptorem pepererit, id quod natum erit, tanquam furtivum, usu non capitur. His consequens est, ut libertas quoque, quamdiu patroni filius nasci possit, eo jure sit, quo sunt, qui patronos habent.*

VOET'S comment upon this part of the Digest is as follows:

“Ad hæc inter homines jam natos et nascituros seu IN UTERO etiamnum CONSTITUTOS, leges distinguunt. In UTERO CONSTITUTOS quod attinet, licet proprie necdum hominis appellatione venire possint ob incertum natiuitatis, sed magistralis velut SPEM ANIMANTIS lex regia consideraverit. L. negat. 2. ff. de mortuo inferendo. FICTIONE tamen juris pro JAM NATIS habentur, QUOTIES DE IPSORUM COMMODO AGITUR. L. 1. qui in utero est 7. Et l. qui in utero sunt 26. ff. h. t. Quâ ratione post conceptionem superveniens parentibus calamitas nocere non solet ei, qui IN VENTRE est: sive enim prægnans mater in servilem deducatur statum, vel ultimo damnetur supplicio aut deportetur, partus liber erit et ingenuus: pr. Instit. de ingenuis l. Imperator 18. ff. h. t. sive ab hostibus capta ibidem pariat, partus postliminii jure gaudebit; cum alioquin ad eos, qui penes hostes et concepti et nati sunt, jus postliminii se non extendat; parentibus apud hostes extinctis. L. qui in utero sunt 26. ff. h. t. junct. l. 1. C. de postliminio. Et licet concepti natiq; ex patre, qui senatu motus est, senatorum filiis haud accensendi sint; CONCEPTI tamen antequam pater ordine moveretur, licet post demum nati, QUASI senatoris filii eadem ratione intelliguntur. L. emancipatum 7. s. 1. ff. de senatoribus. Hereditates quoque legitimæ, ut JAM NATIS deferri solent, ita et NASCITURIS IN UTERO CONSTITUTIS. D. l. 1. qui in utero sunt 26. ff. h. t. quibus et donec nati fuerint, portiones reservantur. L. antiqui 3. Et l. 4. ff. si pars hered. petatur. QUOD SI NON IPSORUM IN UTERO EXISTENTIUM, SED TERTII TANTUM VERTATUR COMMODO, CESSAT ILLA JURIS FICTIO, quâ PRO JAM NATIS HABERENTUR, NEC ALIIS PROSUNT, NISI NATI. D. l. qui in utero est 7. ff. h. t. l. quod dicimus 231. ff. de verb. signif.”

From these extracts, and from Inst. lib. 2. f. 1. Dig. lib. 37. tit. 9. de ventre in possessionem mittendo et curatore ejus, leg. 1. & tit. 38. tit. 8. leg. 1. & lib. 5. tit. 2. de inofficioso testamento, leg. 6. and Swinb. part. 4. f. 15. N<sup>o</sup> 14, it appears, that the fiction of the Roman law, treating children in the womb as living persons, was principally, if not wholly, for their own benefit, and that in general others could not take advantage of such fiction, and that in general it could not be applied to their prejudice.



to learn, that before this recent case of Long and Blackall, there is to be found any adjudication having such an effect; for, as I have already observed, I must protest against considering the case of Gulliver and Wicket, in 1. Wils. as a judicial decision in that way.

SECONDLY, I humbly contend, that in this respect the decision exceeds the very line it professes to adhere to. Lord Kenyon expressly states the rule with an allowance of only *the fraction of a year* beyond lives in being and the twenty-one years. But the effect of the decision in favour of the executory devise is, to *double the fraction of a year*, on account of which tendency of the executory devise your Lordship seems partly at least to have doubted its legality. In other words, nine or ten months are not merely extended into eighteen or twenty; but are so extended, as if the months were still only

In respect to the law of England, the same fiction is adopted for *various purposes*; and more especially for the *advantage and benefit* of posthumous children, in cases, in which *they would be otherwise excluded from provision, or be otherwise prejudiced*. The chief cases and authorities upon this subject are collected in Viner's Abridgment, title *Enfant*, H. 8. and title *Devise*, I. 9. The chief cases since Viner's publication are, Wallis v. Hodson, 2. Atk. 115. Barnad. Cha. Rep. 272. Mr. Jodrell's Manuscript Notes, vol. 2. and Mr. Capper's Manuscript Notes, vol. 2. Beale v. Beale, 1. Wms. 244. Miller v. Turner, 1. Ves. 85. Lancashire v. Lancashire, 5. Durnf. and East 49. Doe on demise of Clarke, 2. Hen. Blackst. 399. Long v. Blackall, in 7. Durnf. and East; and Whitelock v. Heddon, Bosanq. and Pull. Rep. 243.

The point is, whether, according to the cases and authorities in our law, the *fiction* of treating children *in the womb* as *living* persons, thus originating for the *benefit* of such children, and chiefly at least so applied in our law even on the rule of executory devise, can be properly applied for the *purpose of protracting executory devise* beyond lives *actually in being for the lives of such children when born*; or if the fiction may be so extended, whether such an extension should be endured, for the purpose of excluding children *in the womb* from provision; and of so making them *living* persons for their own *exclusion*, merely in order to eke out a scheme of posthumous accumulation, proscriptive to the family of the testator, and at the same time highly dangerous to the community at large.



nine or ten. It is professing no extension, and yet making a great one. It is doubling the allowance for posthumous children, without any profession to increase it at all.

THIRDLY, the decision has the effect of taking the life of a person *en ventre sa mere* for a life *in being*, that is, a *future* life for a *present* one, a *non-existing* life for one *existing*, a *born* child for one *unborn*. This, as I contend and really think, my Lord, operates, though I am sure not intentionally, as imputing to the great Judges who founded and modified executory devise, not merely the most incorrect, but the most deceitful language.—It is in effect imputing to them, that, in drawing the boundary of executory devise, they used language, which confounds persons *in the womb*, with persons *out of it*; persons *in being*, with persons *not in being*; persons *not alive*, with the *living*; *non-entity* with *entity*.—It is in effect, though I am convinced not intentionally, almost imputing to them, that they verbally, directly, externally, and avowedly, included within the boundary only the lives of born persons; but secretly, mystically, internally, and indirectly, intended to superadd persons unborn.—Nay, in effect, it seems imputing to them, though not intentionally I am sure, that, under the pretence and shew of only adding to existing lives in being nine or ten months for the birth of posthumous children to enable their taking under the executory devise, the Judges have contrived impliedly, not only to take that time *twice over*, and so to include the time for *birth of the posthumous child of a posthumous child*, but besides that, as it were imperceptibly, to insinuate the addition of the lives of the posthumous children in the first instance.—It is in effect imputing to them, though I am sure not intentionally, that, instead of using correct, plain, simple, and intelligible language; such as becomes the

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dignity,



dignity, the gravity, the sincerity, the integrity, the duty of judicature; they resorted to the language of disguise, of obscurity, of fiction, of metaphor, of mystery, of delusion.— In a word, it is, as it were, imputing to them, that they deliberately and wilfully spoke one thing and meant another.— I am fully convinced, my Lord, that those reverend judges, who signed the certificate in Long and Blackall, and to whose superior and exemplary characters I bow with submissive veneration, are incapable of intending such imputations against their great predecessors in office. Indeed it is impossible to harbour the suspicion of such an intention, without supposing that they intended to wound themselves; for they themselves have described the boundary in similar terms. But I do humbly submit to your Lordship, that if the principle, on which only as I conceive the certificate in Long and Blackall can be supported, shall finally prevail, there will, in point of effect and consequence, be almost an invitation so to accuse, at least those who heretofore exercised the functions of judicatures in Westminster-hall. If too there was nothing more than the danger of all this aggregate of consequential, though certainly unintentional, imputation, against the judicatures which first indulged executory devise, and then fixed limits to circumscribe it, I should humbly contend, that there would be full enough in the precedent of Long and Blackall to create alarm amongst those zealous for English jurisprudence: nay, such an alarm as might well render the best considered judgment ever given in any of our Courts a fit subject for revision; and much more the judgment, given as it accidentally and unfortunately was in Long and Blackall, without argument, in support of the claim of the party against whom the certificate operated in the nature of a judgment, or in explanation of the grounds upon which your Lordship may be pre-



presumed to have sent the case as a fit subject for solemn argument.

FOURTHLY, I submit, that construing children *in the womb* as *lives in being* makes the rule of executory devise both *superfluous* and *inconsistent* in its terms. I say *superfluous*; because if by *lives in being* the rule is meant to include the lives of children *in the womb*, it is unnecessary to add any time for their birth. I say *inconsistent*; because allowing the due time for birth of the posthumous child, as the last link of the chain of executory devise, imports, that no time beyond is to be allowed; whereas allowing the lives of children *in the womb* to be *lives in being*, is further allowing the lives of the posthumous persons when born.

FIFTHLY, so considering the lives of persons *in the womb* as *lives in being* would, I submit, involve the judges of England in a great imputation. Here the case of Reve and Long, adjudged about six years after the revolution, becomes material. In that case all the judges concurred, on a devise of land, in refusing to save a contingent remainder for a *posthumous* child; though considering a child *in the womb* as a child *in being* would have clearly produced that effect; and though by not resorting to such fiction the testator's heir and his issue were excluded. Will it be consistent or becoming in our judges to refuse holding a child *in the womb* a child *in being*, to give effect to a contingent remainder in favour of a testator's heir and devisee and his issue, and at the same time to apply that fiction merely to add a further link to executory devise? <sup>uu</sup> (e) Should

<sup>uu</sup> (1) The case of Reve v. Long is reported in 3. Lev. 408. 4. Mod. 282. Skinn. 430. 1 Salk. 227. 12. Mod. 53. Comberb. 252. & Carth. 309. By the decision of the House of Lords, the unanimous judgment, first of the Common Pleas, and then of the King's



Should this at least seeming inconsistency be finally adopted, I apprehend, that it will not be excused by the statute of 10. and 11. Wm. 3. which after the case of Reve and Long was made in favour of posthumous children; that statute being

Bench, was reversed in favour of the posthumous child. But this was done, not only against the opinion of all the judges, but appears to have been considered by the whole profession as contrary to law. Therefore, notwithstanding the judgment of the lords, doubts prevailed; and to remove them the statute of 10. and 11. W. 3. chap. 16. in favour of posthumous children was made. The statute even recites the doubts. But it is expressly confined to the case of *remainders*. Judge Levins, who was counsel for the plaintiff in the ejectment in the case of Reve and Long, reports the case in Law French, of which what follows is a literal translation.

“ *Mich. 6. W. and M. in C. B.* ”

“ *Reve v. Long.* ”

“ *IN DOMO PROCERUM POST CLAUSUM HUIUS TERMINI.* ”

“ Error of a judgment in C. B. affirmed in B. R. where on a special verdict in ejectment the case was this. John Long seized in fee devises the lands in question to Henry Long the elder son of his brother Richard for life; remainder to his first son in tail; remainder to all his other sons in the same manner; remainder to Richard Reve lessor of the plaintiff for life; remainder to his first and all his other sons in tail; with diverse remainders over: and dies. Henry entered and was seized; and before his having any son born dies leaving his wife grandment enseint. Richard the lessor enters as in remainder: and six months after, the defendant, son of Henry was born, and his guardian enters for him on the lessor, whereupon he brings ejectment. And the case being tried before Turton baron of the exchequer, all this matter was found specially. And on argument in C. B. judgment was given for the plaintiff by the whole Court for two reasons: 1. This being a contingent remainder to the first son of Henry, and he not being born at the time of the determination of the particular estate, this becomes void. 2. The next in remainder being the lessor, and he having entered before the birth of the first son Henry, was in by purchase, and shall not be put out by an heir born afterwards. 5. E. 4. 6. 9. H. 7. 5. &c. Whereupon the defendant brings error in B. R. where the judgment was affirmed by the whole Court: upon which he brings error in parliament, where the judgment was reversed by almost all the Lords in parliament, because being in a will, they took it by the intent and equity and meaning, which they said cannot be to disinherit the heir of the name and family of the deviser for such nicety. But ALL THE JUDGES were strongly dissatisfied with this judgment of the Lords, and did not change their opinion upon it, but strongly blamed Baron Turton for permitting it to be found specially, where the law was so certain and clear. LEVINS for the plaintiff in the ejectment.”

confined



confined to preserving a *contingent remainder* for them, and not applicable to *executory devise*, especially such as is to abridge their estates.

~~FIFTHLY~~ <sup>*fifthly*</sup>, It seems no slight objection against the certificate of the King's Bench in this case of Long and Blackall, that the *posthumous* son was not considered as a child *in being*, to let in the child to an estate, the rule of *executory devise* being sufficient for that purpose without resorting to that fiction; but was so considered to *abridge* the estate of the posthumous child, by converting it from an absolute estate into a mere life-interest.

~~SIXTHLY~~ <sup>*seventhly*</sup>, I am persuaded that there is still more than all this against the certificate in Long and Blackall, on the point of objection I am now making against that case, that is, on the point of superadding *not the time for birth*, but *the whole life of a posthumous child*, or rather the whole lives of posthumous children, to lives in being, *for the mere purpose of protracting executory devise, and of lengthening its chain of contingency*. Accordingly I beg leave to insist; and *à corde ipso*, and from a self-conviction founded on the most elaborate consideration, and a long experience of this subject of *executory devise*, I do humbly insist; that yielding to such a latitude in the construction of the boundary of *executory* <sup>*very*</sup> ~~devise~~ will lead to an extension of that boundary, not only against the words of those great judges by whom the boundary was constituted, but against both their real meaning, and in a way extremely novel and at the same time very mischievous to the public interest.—If lives *in being* may be taken for the contingency of *executory devise*; and if the *lives of children in the womb* are to be considered *as lives in being*, and are to be taken for the



the same purpose; and if twenty-one years are to be allowed beyond both; *the boundary becomes in effect extended to the lives of a generation beyond lives in being.* Thus the rule, of *lives in being at the death of the testator* and twenty-one years after the expiration of those lives, is enlarged into an allowance of *lives in being at the death of the testator, of LIVES OF PERSONS IN THE WOMB at the same time, and twenty-one years besides.* But I cannot think such an interpretation of the boundary of executory devise conformable, either to the authorities by which the rule is fixed or the reason of the rule. I say that such an interpretation is not according to the authorities. They, in general, including what Lord Kenyon himself has repeatedly stated, mention *lives in being* and twenty-one years with the *fraction of a year*, as the *ne plus ultra* of executory devise: and I call upon the gentlemen, on the other side, to cite the books, in which this doctrine of protracting executory devise to the prejudice of *unborn* persons through considering them as *actually born*, in order to exclude them, or to abridge their quantity of estate, that is, by converting an *absolute estate* into a mere *life interest* in favour of a second generation of unborn children, is registered. I say, that such a latitude of interpretation is *not according to the reason of the rule.* Under *that*, the boundary is constituted, with reference, and in analogy, to the entail of inheritance and by settling or devising an estate for life with remainders in tail to the sons and daughters of the tenant for life; and in order to indulge settling of property of every species by executory devise, upon the terms of keeping property entailed in that form as long unalienable, as if the entail was in the strict and regular way by estate for life and remainders in tail. For this purpose the endeavour has been to make the two modes of entail correspondent in this respect,

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so far as the difference between an entail barrable by common recovery and an entail not so barrable will well allow. But if the *lives of children in the womb* may be introduced between *lives in being* and the *twenty-one years after*, and may be used to enlarge the boundary of executory devise; if the *fiction* of the Roman law, and under the adoption with us of our law also, in considering *children in the womb* as *living* persons, is to be applied to accomplish such an enlargement; if a legal *fiction*, invented by the Roman law, and adopted by ours for the *advantage of children in the womb* and to enable their taking advantage both of legacies and devises and in the case of intestacy to enable their sharing in distribution, is thus to be converted against both them and others *into an instrument of extending executory devise*, by adding a new link to the chain; if what our judges avow to be fiction and for the benefit of posthumous children, is to be confounded with what our judges have gravely and solemnly uttered as no fiction, and is so to extend a boundary they are pledged not to exceed: then, I humbly beg leave to affirm, my Lord, *that the boasted analogy, between strict legal entail by estates for life with remainders over and the irregular but permitted entail by executory devise, will be disturbed*; and that thus executory devise will be like a ship without a rudder, and will degenerate from a wise policy into a public grievance. Under such an enlargement of lives, the entail by executory devise, which from its nature is unbarrable by recovery, will continue property unalienable for a longer time, than can be effectuated by entail through the medium of remainders. In the latter way, the ultimate point, to which barring by common recovery can be postponed, is twenty-one years after the death of the tenant for life including the fraction of a year for the birth of posthumous issue. But in the former way, if the executory devise



be so constituted, as to keep the executory devise uncertain till the moment he is to take, as in fact is done by the will of the late Mr. Thellusson, then the entail will continue unbarred and unbarrable, during lives in being and twenty-one years after and the fraction of a year, *and also during the whole lives of the posthumous children besides.*—In thus stating, that the necessary consequence of confounding the *unborn* with those *born*, and of converting what was delivered in a plain sense of the words into an ingenious fiction, a solemn rule of law into a metaphor, I trust, that I am founded both in *authority* and in *practice*. In *authority*, I hold myself to be warranted by the case of *Humberston and Humberston*, (*u*) and by other cases of that class, which establish the rule, that *an estate to an UNBORN child for life, with remainder to his first and other sons in tail, shall operate as an estate tail in the UNBORN child*: for that rule is ever given *without the least hint of an exception of CHILDREN IN THE WOMB*. In *practice* I consider myself as equally warranted; for I take upon myself to say, from my own personal experience assisted by the experience of those I am intimate with, that the habit of conveyancers, in respect to remainders to unborn children, is against attempting to make posthumous children mere tenants for life with limitations to their issue as purchasers. Yet, if that was thought feasible, a very short proviso might be framed to produce that effect in entails by remainder. I do not mean, that there are not some few instances of such experiments. The case of *Long and Blackall* furnishes one instance of an executory devise so framed, and there may be instances of remainders to unborn children framed with a like view. But I mean, that the general habit as to remainders is to the contrary. To me personally the thing was never so much as proposed. I have the honor of being intimate with some of the most eminent conveyancers both at the bar and other-

(u) In 3 P. Willms. in Com. Rep. & in Prec. in Chanc.



wife. But I have not heard, that any of them ever practised or have been asked to practise in that way. Not even in the settlements of persons of the first family and fortune, is it usual so much as to think of such extension of unbarrable entail. Not even in the ambitious will of that very great general and very profound statesman John Duke of Marlborough, though the first lawyers of the country assisted to effectuate his wish of perpetuity of entail to the utmost extent legal acuteness could accomplish, was it attempted to risque this species of experiment. I humbly conceive, therefore, that so letting in lives of children *in the womb*, in addition to the lives of persons in being and the twenty-one years after, and so protracting the contingency of executory devise beyond the latest time endured for postponing the barring by common recovery, is inconsistent with the very rule, which Lord Kenyon himself lays down in the case of Long and Blackall. His words in that case are as follow: "The rules respecting  
" executory devises have conformed to the rules laid down in  
" the construction of legal limitations; and the Courts have  
" said, that the estate shall not be unalienable by executory devises  
" for a longer time than is allowed by the limitations of a common  
" law conveyance. In marriage settlements, the estate may  
" be limited to the first and other sons of the marriage in  
" tail; and until the person, to whom the last remainder is  
" limited is of age, the estate is unalienable." Such is the language of Lord Kenyon in the case of Long v. Blackall. But if I am founded in the explanation I have given, of the consequence from the extension of executory devise, by including the lives of posthumous children as well as lives in being, such an addition of persons *in the womb* will enable making property unalienable longer by executory devise than can be done by the regular form of entail; nay, will enable



it to the full extent of the difference between the posthumous child's attaining *twenty-one*, and the *whole of his life*. In this view, therefore, the adjudication of *Long v. Blackall*, if it is to be considered as meant to rule the point of adding the lives of posthumous children to lives in being for the purpose of executory devise, a second time infringes the very boundary it professes to observe.

UPON these reasons I humbly conceive, that the certificate of the King's Bench in *Long v. Blackall*, if it is to be considered, as intentionally sanctioning the allowance for a posthumous child in the case of executory devise *twice over*, and as impliedly extending the *TIME FOR BIRTH of the posthumous child to the WHOLE LIFE of him when born*, is not merely an extension of the contingency for executory devise beyond its *ne plus ultra*, and as such indefensible; but is one of a most dangerous kind; not only adding a new fraction of a year for the birth of a posthumous child to the fraction before allowed for the like purpose, but by the necessary consequence adding *the whole life of a posthumous child*, and so fundamentally subverting the analogy between entail by executory devise and entail in the common form of legal settlement, and granting much more of certain duration to the irregular and barely permitted mode of entail than is permitted even to the regular and strictly legal mode. So also viewing the certificate of *Long v. Blackall*, I humbly beg leave to question the authority of that case. I also humbly beg leave to say, that the case of executory devise, sent by your Lordship for the opinion of that Court, was not sent on light grounds; but was such, as renders it unfortunate to have had decision on the executory devise in question with only an argument on one side; and was such as evinced, that your Lordship looked far beyond:



beyond the *surface* of the ordinary learning of executory devise; and that your Lordship saw, that there was real danger of a new extension of that boundary, which our Courts both at law and in equity are *deeply pledged* to defend against encroachment. Great too, or rather irrepealably fixed, as my distance is from judicial situation, I hazard this free though respectful manner of treating the decision in Long and Blackall, without danger of offence to the learned judges, the effect of whose adjudication I thus resist. By that resistance for the purpose of the present cause, I perform a professional duty, in a case, of which the vast value is almost beyond example; and I aim to rescue executory devise from that, which, if endured, would render the indulgence a mischief instead of a convenience. I feel also, that your Lordship's sending the case for argument in the King's Bench justifies me, in doubting the legality of allowing a new fraction of a year to lengthen executory devise, or rather such a new fraction with the further addition of lives of persons *in the womb* to lives *in being*. Nay, I feel, that in so doing I help to give an opportunity of recalling a decision; which, as it happened, was argued on one side only; and which, if it be erroneous, the learned judges, from whom it came, will I trust be the first to wish to have annulled. *The greatest judge is never so great, as when he sees his own errors, and is eager to correct them.* Permit me to add, that there are occasions, upon which a judge, however elevated, however fortunate, however highly endowed, however prosperous, may be assisted in the discovery of errors, by a professional lawyer, however depressed, however inferior, however unfortunate, however discountenanced, however proscribed, however unprotected.



BUT, my Lord, though the case of Long and Blackall should be deemed the most full, solemn and conclusive precedent of adjudication for extension of executory devise, by allowing the fraction of a year for birth of a posthumous child *twice over*, and *by adding to the time for birth of such a child the whole duration of his life*, still it would not reach saving the trusts, in the present case. In Long v. Blackall, *doubling* the allowance for a posthumous child was to give effect to an executory devise *regulating a series of provisions for children of the testator and their issue*. But in the late Mr. Thellusson's will the executory devise is constructed, to deny *all enjoyment* of the devised property to the testator's *whole existing and future family and all the world besides*, to the latest moment, which tampering with the boundary of executory devise could in the first instance *risque suggesting to elude its real boundary*: and for this cruel purpose, *the posthumous children are used as mere instruments for excluding both themselves and all others*. To express this more shortly, in the case of Long and Blackall, the purpose of the provisions was in some respects *laudable and meritorious*: but here the purpose is *most unmeritorious*; is even *cruel and unnatural*. In the former case, therefore, the judges might feel it a duty to do all in their power to save the will. But the present case is such, as to make it the duty of judicature, to do all in its power to disappoint the provisions the will contains: and what might be endurable in the *natural* will of Mr. Blackall, who was the testator in the other case, may properly be considered as quite intolerable under the circumstances of the unnatural dispositions made by the will of the late Mr. Thellusson. Besides *in the case of Long and Blackall, the experiment went no further than including the posthumous children of one person*. But here the experiment embraces



*braces the posthumous children of six persons according to the state of the testator's family at the date of his will, and avows comprehending the chance of a much more extensive stock of posthumous lives. What might be endured for the life OF ONE POSTHUMOUS child may be beyond all endurance for WHOLE CLASSES OF POSTHUMOUS LIVES.*

IN these views of this my third charge against the trusts in question, I contend, my Lord,—not only, that the double allowance of the fraction of a year for birth of a posthumous child, that is, first in the commencement of the executory devise and again in the close of it, is an encroachment upon the proper boundary; but is one of a most dangerous nature, in respect of it's opening the door to let in and actually letting in *posthumous lives* in addition to lives *in being*:—not only, that this charge of excess of executory devise is countenanced by your Lordship's sending the case of *Long v. Blackall* for the opinion of the King's Bench on this point of the double allowance; but that the accident of deciding in the King's Bench, *without hearing any argument in support of the doubts, which influenced your Lordship to send the case*, in effect leaves the point in some degree as if no decision had passed upon it:—and not only, that the real tendency of the case of *Long v. Blackall* somehow or other seems to have escaped the observation of the King's Bench; but that the court decided, as if the fraction of a year was allowed for the birth of a child in the womb only *once*, when the effect of the decision is to allow it *twice*; and that so, however unintentionally, the court admitted a most extensive inroad upon those very limits of executory devise, which Lord Kenyon himself, at the very moment of deciding, forcibly stated to be it's utmost boundary both in letter and in principle; and therefore that, the reasons of the certifi-



cate in the case of Long and Blackall are destructive of the authority of that certificate, and in perfect unison with your Lordship's doubts in sending that case out of equity for the opinion of a court of law.

THE result of this long consideration of my third charge <sup>for excess of executory</sup> against the trusts in question, as I submit to your Lordship, stands thus.—On the one hand, for me and against doubling the nine or ten months for birth of posthumous children and against comprehending future lives as lives existing, I have the letter, the sense, the spirit, the principle, the integrity, and the very essence, of the rule for the boundary of executory devise, and of the authorities and practice upon which that rule depends.—On the other hand, there is against me, only the single case of Long and Blackall: and the decision in that single case not only was unsolemn and instantaneous, and without argument for those against whom the decision operated, but professes to acknowledge the boundary I contend for; and so in this case of Long and Blackall I have, as I conceive, the *reasoning* of the Court of King's Bench with me, though not their *certificate*. Nor is this all: for such is the unmeritoriousness, such is the excess of the present case, that even the fullest application of the certificate in Long and Blackall would not suffice to shelter the trusts in question, either against the objection of doubling the allowance of a posthumous child in executory devise, or against the objection of adding to lives in being a new link of continuation through posthumous lives, and of so making posthumous lives instruments of an enlarged posthumous accumulation.



## THIRD DAY'S ARGUMENT.

DELIVERED

THE 7th OF DECEMBER, 1798.

MY LORD,

**I**T was a pain to me yesterday, that I found it necessary to detain the Court for so very long a time,—first in detailing the history of executory devise, and in making the inferences required for the purpose of founding the proper objections to the late Mr. Thellusson's great testamentary trust;—and afterwards in evincing *three* of the *six excesses*, which I impute to the executory devises his will unfeelingly ambitiously and extravagantly creates.

YET I do not repent of having thus feverely tried the patience of the Court; because I am convinced, that your Lordship and the reverend Judges your assistants, would not, in a case so deeply involving the character of English jurisprudence, and so deeply affecting the most valuable interests both public and private, wish for the least sacrifice to avoid a momentary personal inconvenience. If too I have trespassed in this respect, I did not act, without some degree of sanction, or rather encouragement, from the two eminent advocates, under whom I have the honour to take my share in this new battle of executory devise. It was apparent, that in order to  
leave



leave a proper opening for the application of my known laborious attention to the subject of the Thelluffon will, they only glanced at some of the topicks, for which they knew me to be more particularly prepared.

THUS much I offer in the way of apology for my extraordinary length in the argument of yesterday.

BUT I have the pleasure to say, that there is no danger of my again trespassing in the like extent on the time of your Lordship in these causes.

THE points, indeed, which I have still to argue, will not I trust, be found scarce less important than those I have already disposed of. But fortunately the compass of argument upon the remaining points is far more circumscribed: and I trust, that what I have to offer will be rapidly dispatched.

YESTERDAY I finished with the THIRD of my charges of excess of executory devise against the great testamentary trusts in question.

Now therefore I shall proceed to the FOURTH of those charges.

Third excess of executory devise, namely, taking a number of lives, merely to protract the accumulation, and the vesting of the executory devises.

THE FOURTH charge, which I alledge against the trusts in question, for excess of executory devise, is taking a *number of lives, merely to protract the late Mr. Thelluffon's trust of accumulation and the vesting of his executory devises.*

ACCORDING to the *letter* of the common manner of stating, how the extent of executory devise is circumscribed, the contingency



contingency as I have more than once had occasion to mention, must be such, that if it happened at all, it must happen *within a life or lives in being and twenty-one years afterwards, including the fraction of a year for birth of a posthumous child.*

It is natural enough, at first and whilst we look only to the *letter* and *surface* of the boundary to executory devise, to suppose, from this manner of expressing the rule, a *licence* of chusing lives in being, without regard, either to the *number of the lives*, or to *their having connection with the executory devise beyond serving to extend it's contingency.*

NOR is it in the least surprizing, that when a testator, ardent as the late Mr. Thellusson was to gratify his unnatural wish of posthumous accumulation, was informed of the terms of the rule of executory devise, he should interpret it in a way so chiming with his purpose; and then seek to substantiate his project, by straining to take advantage of the rule of executory devise in it's utmost *literal* latitude.

BUT in judicature the rule of executory devise must be inspected in a different manner; must be examined with more penetration, and with different views. In a court of justice, the *reason* of the rule must be scrutinized, as well as the *language* in which it is *usually* expressed. There it is a duty to be vigilant, in guarding against the abuse of executory devise; and for that purpose to be even austere, in resisting all attempts to defeat the *spirit* of the rule under shelter of it's letter. There it is a duty, to discountenance in the strongest manner *all tampering* with the rule; and sternly to reject *all contrivances, however colourable*, to elude it's real boundary.

Now looking to the *reason* of the rule, and to it's *substantial*  
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limits,



limits, I say, what I have already endeavoured to shew, that *executory devise* is an *irregular* mode of entail, *indulged* by the courts, to enable settling every species of property, in a form not consonant to the strictness of our law as to particular estates with expectant remainders and reversions; and that the *spirit* of the rule, which our courts have gradually established as a boundary to executory devise, is a *qualification of their indulgence, to prevent the irregular and barely permitted mode of entail, from exceeding the limits and purposes of the regular and strictly legal mode.*

BUT it is not, I conceive, in the least consistent with the reason of this *indulgence* of executory devise, or with the *spirit* of such a boundary,—to permit lives in being to be taken *indefinitely* for the purpose of protracting executory devise, to the utmost possible extent the duration of an indefinite number of lives can accomplish; or even to sanction taking any great number of lives, only connected with the executory devise as they are used to extend it beyond the duration of the usual and ordinary mode of keeping property in an unalienable state under a regular entail.

IT is true, that the *letter* of the rule, as we usually express it, mentions lives in being generally and without limitation. But even the *letter* of the rule, according to this *common parlance*, rather imports, that the contingency *must not exceed lives in being*, than that *any number of lives may be taken*. There is no inconsistency in saying at the same time, that lives in being shall not be exceeded; and that such lives shall be under some qualification as to the number and choice of them. Even upon the *letter* then of the rule in *common parlance*, it is not necessary to suppose lives in being without qualification.

WHATEVER also may be the result of a dry interpretation of the



the letter of the rule, neither the *spirit* of the rule, nor the *effect* intended by the judges in adopting or rather constituting it, nor the *practice* upon the rule, accords with an indefinite and unqualified number of lives.

As to the *spirit* of the rule, such a construction of it would evaporate the true spirit. The *spirit* is, not to permit executory devise to excurse beyond the legal and regular mode of entail; not to suffer an entail to be unbarrable longer by the mode barely permitted, than by the mode strictly legal. But entail by executory devise would continue unbarrable longer than entail under a strict settlement by creating estates for life, with remainders in tail to the sons and daughters born or unborn of the tenant for life, if lives in being of any persons and *in any number* could be taken for the basis of executory devise. I say, that such would be the consequence; because then an executory devise might be, upon the contingency of *the death of the survivor of all the existing branches of our royal family, of all the existing peers of Great Britain and Ireland, of all the existing members of the two houses of parliament in both islands, of all the persons whose lives are comprized in the several existing tontines; nay, if children IN THE WOMB are to be counted as persons IN BEING, of all children in the womb to all these CLASSES of persons.* Even this is not the utmost latitude; for if the number of lives is to be quite indefinite, the contingency may be extended, *so long as any person can be found in Europe, or rather in any part of the known world, who was either living or in the womb at the death of the particular testator.* But if the phrase of *lives in being* is to be construed thus indefinitely, or in a small part of such an extent, then through executory devise it would become quite facile, to constitute such an entail *as could not fail to continue unbarrable for above a century, or rather for almost a century and a half:*



*half*: for we have not a yearly bill of mortality for London and it's vicinity without some person who has lived several years beyond the age of one hundred; and *adding the twenty-one years and the double allowance of nine or ten months for posthumous children*, that is, first at the beginning of the executory devise, and then at the expiration of the last of the lives fixed upon, with the chance of a minority when the executory devise commences, there will be a CERTAINTY of about *one hundred and forty years*, and the *chance of twenty-one years more*. Nay, even this is rather underdating the matter: for a minority of nearly twenty-one years after expiration of the lives and twenty-one years beyond might be almost absolutely secured, by so framing the executory devise, as to require the devisee's being an infant not a year old. But an executory devise CERTAINLY keeping property unalienable for *one hundred and forty years*, and not improbably for above *one hundred and fifty years*, has *no substantial analogy* with the ordinary and legal mode of settlement; for under that there is not a PROBABILITY of keeping an estate unalienable for above *half of a century*, and the chance is against it's reaching that time. Consequently to understand the phrase of *lives in being* so extravagantly, will be to proclaim, that executory devise may CERTAINLY accomplish almost *thrice as long* a duration for entail, as the regular mode of settlement can *probably* ensure. This would be *to destroy the analogy between executory devise and the regular mode of entail*, at the very moment the rule professes to establish that analogy; and would go *to the extent of enduring under the discretionary permission almost treble the time under the strictly legal right*.

As to the *effect* intended by the judges in allowing lives in being as a basis for executory devise, and the *practice* under that allowance, I apprehend, that the idea, of applying an indefinite  
number



number of lives, to spin out executory devise, never so much as occurred to the minds of those, who gradually extended executory devise to the boundary of an unbarrable entail under the legal form of settlement. Our judges for some time hesitated about exceeding one life: and this fully appears in the history I have given of the growth of executory devise in the instance of terms for years. But this hesitation was overcome by the good sense of lord chief justice Hale, lord keeper Bridgman, lord chancellor Nottingham, and other distinguished judges; who saw, that to constitute the boundary of executory devise with a just analogy to settlement by estates for life and remainders, it was necessary to allow to the former irregular species of entail the same proportion of lives, as was of course allowed under the latter and regular species, that is, the lives of as many persons in being, as were the real subjects of the provision in the particular will or settlement. To this use of lives in being for the contingency of executory devise it is, that we should apply the language of lord Hale, and after him of judge Twifden and others, when they observed on the allowance of several lives, that *all the candles were lighted at once*, and therefore after all it was only the duration of one life. This phrase, that *the candles were lighted at once* (which however is wholly inapplicable to children *in the womb*, whose candles of life are not lighted till they are born, and which therefore will not cover the present case) was originally applied to the trust of a lease for *one* living person for life, and after his decease for the life of a *second* living person in like manner. So applied to the lives of *two* living persons, the phrase was natural and sensible. The difference in point of duration of unbarrable entail between one existing person tenant for life, and having two or three existing persons tenants for lives successively, is of slight importance; and in the way of successive provisions for two or even several persons, the extension may



may be well yielded, without danger of going beyond, what belongs to ordinary settlements of inheritance upon successive tenants for life with remainders to their respective children. But to infer from there being so slight a difference between one life and two lives, in a case so put, as not to make it an object to distinguish, that there is not any material difference, between taking one life or in the course of settlement two or three lives for the contingency of executory devise, and taking *millions* of lives for the mere purpose of protracting entail by executory devise, seems rather the language of passionate prejudice, than of cool reasoning. Lord Coke, in his Commentary upon Littleton, fol. 260. b. cites and applies the maxim *de minimis non curat lex*. But according to this reasoning from *two lives* to *millions of lives*, it would be justifiable to say, that because our law regards not a *very small* difference, therefore it regards not the *greatest possible* one; and thus the rule, *non curat lex de MINIMIS*, would become *non curat lex de MAXIMIS*. But I apprehend, that such great and temperate judges, as lord Hale, could not mean to disregard the difference between two lives and millions of lives. I submit, that they merely intended to say, that there was no great matter of difference in duration of time between the settlement of a term of years on one existing person for life and on two existing persons for their lives successively. Accordingly in the beforementioned case of Scattergood and Edge, as reported in Salkeld, the court spoke of *twenty-two or thirty years*, as the *probable* result of taking lives in being. This way of considering lives in being is no ill calculation as applied to estates for life *in the common course of family settlement*; but would, I humbly insist, become most indefensible, if applied to taking an *indefinite* number of lives unconnected with the property devised or settled, except by being called in aid to defraud the real spirit of the rule of executory devise and  
to



to abuse it's indulgence. Had the attempt at such an abuse been expected by the great judges, to whose wisdom we owe both the permission and boundary of executory devise, it is probable, that whilst they were <sup>making</sup> ~~making~~ out an indulgence to suit general convenience, and for that purpose sanctioning a species of entail which enabled persons to settle every species of property, and indulging those who were meant to be accommodated, our courts would have been more explicit, in guarding against a misconception of the sense, in which they extended executory devise from *one life in being* to *several lives*. But the *practice* under the rules of *lives in being* proves, that the courts were well understood. The step from *one* life to *two* or *more* lives was taken by lord Hale just after the restoration, or, according to lord chancellor Nottingham's manuscript Reports and Prolegomena, a few years before: and I find from lord keeper Bridgeman's manuscript reports, which I have and which are first-rate specimens of judicial argument, that lord Hale was soon followed by the other judges. But though almost a century and a half have since passed, I doubt, whether so much as one instance, of an attempt to act upon the rule, as giving a right to take an *indefinite* or a *very great* number (*w*) of lives *merely* to *protract*

(*w*) In the course of a very spirited and able argument in support of Mr. Thellusson's Will by Mr. Pigott as counsel for the acting trustees, to prove that on the contingency for EXECUTORY DEVISE the number of lives is immaterial, there was a reference to some words of lord Chancellor Talbot in the case of Low and Burron, which arose on the entail of a lease for three lives and is in 3 Wms. 262. The words referred to were as follow. "Here can be no danger of a perpetuity, for all these estates will determine on the expiration of the *three* lives. So if *instead of THREE there had been TWENTY lives, ALL SPENDING AT THE SAME TIME, ALL THE CANDLES LIGHTED UP AT ONCE, it would have been good: for in effect it is only one life, viz. that which shall happen to be the survivor.*" This language of Lord Talbot was introduced by the learned counsel for the will of Mr. Thellusson, as an authority to shew, that any number of lives may be taken for the contingency of *executory*



*protract executory devise*; nay, whether, till the present case, so much as one instance, of experiment in that way, can be found.

*executory devise*, and that all, which the rule of executory devise requires, is to have the lives wearing out at the same time.

But this language of Lord Talbot was *not applied by him to EXECUTORY DEVISE*. He applied it to the case before him, which was of such a kind, as to render the doctrine of executory devise *QUITE FOREIGN*. The case, upon which Lord Talbot thus expressed himself, was, according to the report in Peere Williams, that of a Mr. Casson, who, being seized of lands under a *lease to him and his heirs during three lives*, devised the lease to his daughter for her life, remainder to her issue male, remainder to a Mr. Low. The daughter married; but previously conveyed the lease in settlement by lease and release, to the use of her husband and herself and the heirs of their bodies, remainder to the heirs of the husband: and she dying without issue, the points were, whether the devise to Low in remainder was good; and if so, whether the remainder to Low was *barred* by the conveyance of the testator's daughter on her marriage. Lord Talbot held the remainder to Low, though only in a descendible freehold, good; but would not allow the daughter's conveyance to be a bar, except to her own issue, and therefore held it no bar to Low's remainder. From this statement it appears, how *foreign to executory devise* this case was; and besides this, the case in point of authority is objectionable.—1. *Executory devise* was *foreign to the lease for lives itself*: for, whether a lease for three lives was good or not, if it were possible to raise a doubt on such a point, could not by any stretch of ingenuity be made to connect with the doctrine of executory devise. On such a case I should say, that it was quite indifferent in point of legal validity, for what number of lives the lease was granted; for a lease for a million of lives is as alienable as a lease for one life.—2. The *entail*, or *quasi entail*, of the lease for lives, was equally foreign in Lord Talbot's view of it: he holding the entail to be *barrable*, so far as the issue of the first taker was concerned, by conveyance in analogy to the mode of barring the issue by the ancestor's *alienation* in the case of a *conditional fee* before the statute de donis; and the remainder over being alienable by him, to whom and to whose heirs it was devised; but *executory devise* being quite of another nature and *absolutely unbarrable* by alienation or otherwise, on which very account it was, that a boundary to the contingency of executory devise became necessary.—3. The doctrine of Lord Talbot, as to the remainder's not being barred by the alienation of the *quasi* tenant in tail of the lease for three lives, is most completely over-ruled by subsequent adjudications. It is now quite settled, that one, having an interest in a lease for lives in nature of an estate tail, may, by lease and release or any other mode of alienation, or at least any other sufficient to pass a freehold, bar *both his own issue and THOSE IN REMAINDER*. There is a dictum of the court to this effect in a chancery case as far back as 1691. (See in 2 Vern. 225. the case of Baker v. Bailey.) But the first absolute decision of this point, which occurs in



found. Not even the famous testator Mr. Hopkins (of whom lord Hardwicke said, if he could have framed a will that no one

in our printed books, seems to have been by Lord Chancellor Macclesfield in 1722, in the case of the Duke of Grafton and Hanmer, which decision is noticed by Lord Hardwicke in 1 Atk. 525. and is given with a short state of the case from the Register's book in 3. Wms. 266. Probably Lord Talbot was unapprized of this adjudication by Lord Macclesfield. But, be that as it may, there is a series of adjudications since Lord Talbot's time, recognizing the decision by Lord Macclesfield and founded upon it. Of these cases there is an enumeration in the 3d ed. of Mr. *Fearne's* profound book on *Remainders and Executory Devise*, p. 385 to 391. To them should be added, the case of Blake and Blake, which was before the court of Exchequer in 1786, and of which there is a note in Mr. Cox's edition of Mr. Peere Williams's Reports, p. 10. and the case of Blake v. Luxton in 6 Durnf. and East, 289, and also the new matter in Mr. Powell's note in p. 390 of his edition of so much of Mr. Fearne's book as relates to executory devise. Therefore the only part of Lord Talbot's words in the case of Low and Burron, which can possibly be made in the least to bear upon executory devise (if any part can be made so to bear) appears to contain doctrine now most thoroughly exploded.

For the sake of the learned reader, I will add a short report of this same case of Low and Burron from the Manuscript Reports of a deceased barrister heretofore of great practice and eminence, namely, WILLIAM MELMOTH, Esq. who was co-editor with Mr. Peere Williams of Vernon's Reports, and as I guess sole compiler of the Index of matter to the two volumes, and who was father of the venerable and elegant translator of Tully's and Pliny's Epistles.

Mr. Melmoth's report of Low and Burron is in these words.

" Low and Burron.

" Lord Chancellor,

" 17 May 1734.

" A lease to A. and his heirs during three lives was devised to B. and the heirs of his body, with remainder to plaintiff.

" B. by lease and release, conveys the premises in consideration of marriage, and the defendant claims under that settlement.

" Among other questions upon the defendant's plea, one was, whether a lease for lives could be entailed in this manner; and if it could, whether the remainder over was not barred by the lease and release.

T

" LORD



one should take his estate, it is likely he would have done it) was advised to attempt this species of fraud upon the rule of executory devise (x). Nor did the frigid and learned apathy of Mr. Bradley make such an attempt on the rule as to *lives in being*. But the miserable vice of avarice is not peculiar to the present age, nor to the time of Vulture Hopkins, as he was called. All times have been disgraced, by avaricious fordidness, and by the longings of posthumous avarice; and at all times it has been open to misers, to demand professional assistance to execute schemes of stopping the use of property. This lateness of the attempt, then, to strain the rule of *lives in being*

“ LORD CHANCELLOR of opinion, a lease for lives might be so entailed; and the  
“ issue, if any, or if none, the remainder man, took as special occupants; and there  
“ was no danger of a perpetuity, for the estates depended upon *three* lives, which were  
“ all in being. And though this case is not within the statute *de donis*, which re-  
“ spects only estates of inheritance; yet a lease for three lives might be limited to one  
“ in tail with remainders over, for it is only an appointment who shall be the special  
“ occupant.

“ As to the lease and release, he was of opinion, that the remainder to the plain-  
“ tiff was not barred thereby. Nothing passed by that conveyance, but what B. had  
“ a power to grant.

“ However the defendant's plea was *overruled* upon some other circumstances,  
“ which were in the case.”

With respect to the latter part of this report, probably the word *overruled* is a mistake; for according to Mr. Peere Williams the court *allowed* the plea, and the circumstances he states appear to confirm his account; and if he is right in this, Lord Talbot's opinion, that the remainder over to Low was not barred, was in a manner *extrajudicial*.

(x) See the case of Hopkins v. Hopkins in 1. Atk. 581. Lord Hardwicke's words are in p. 589 of that book. In a manuscript note I have of Hopkins and Hopkins from papers of the late Sir Thomas Sewell, master of the rolls, the words of Lord Hardwicke were: “ I must own, that I believe, that if the testator could have framed a  
“ will so as no person should take the immediate profits, he would have done so.”

into



into a right to take *lives in being* INDEFINITELY, proves, that the rule was not understood in any such latitude, even by those, who were seeking to take the fullest advantage of the rule in every possible manner.

UNDER a reliance upon these reasons, against construing the rule of *lives in being*, as giving a right to assume lives *indefinitely* for extending the contingency of executory devise, I claim to insist, that neither *an unlimited assumption*, nor *any approach to it*, is endurable even for the *most meritorious* executory devise ever yet generated; and much less is endurable for as *cruel and unnatural* a purpose, as ever contaminated the veriest miser yet heard of.

HERE, therefore, it only remains to consider, whether *tampering* with the rule of *lives in being*, as it is practised in the formation of the trusts in question, is sufficient to constitute an excess of the rule.

THAT the late Mr. Thellusson's will amounts to *tampering* with the rule of *lives in being*, is grossly apparent. He takes seven classes of lives to work upon. Through these lives, the testator gains the lives of three sons of the testator and of three grandsons; not to provide for and make them happy; but, *to exclude them from provision*, and so far as their grandfather's unfeeling dispositions can operate, to make them miserable, and at the same time *to exclude all others* from enjoyment of the property: and then in the way of fresh supply of faggots to feed the fire for his hot-bed of accumulation, he grasps the lives of *all such issue, as should be born to his three sons and his three grandsons and to the issue of his future grandsons, between his will and his death, or should at his death be in the womb.*



There is such a stretch in this selection of lives, as shews, that at least he was not without hope to live long enough to see great grandchildren married and having issue; and that in his view, his six faggot lives for protraction of his executory devise coupled with accumulation would probably before his death be encreased to twenty or even thirty lives. Nor was there any thing very extravagant in such an expectation. When he made his will, he was little more than sixty years of age; and from his perfect health and seemingly strong constitution, it was probable, that he might live at least about twelve years longer; and as his three sons were married to ladies bearing children, the prospect of adding sixteen or even above twenty new lives, and so encreasing the stock to two and twenty or almost thirty, was by no means remote. Indeed this prospect was not realised; because, in consequence of a sudden failure in his health and constitution, he lived scarce more than a year after his will. But even in that short time there has been a gain of three additional lives: for his third son's lady was brought to bed of a son between the will and the death of the testator; and his eldest son's lady has been brought to bed of twins, which were in the womb at the death of the testator, and are therefore just born time enough to extend the executory devise, and if the will shall prevail, to be excluded from all benefit under the dispositions of their unnatural grandfather, and to live sacrifices to his inordinate selfishness and avaricious vanity.

THE short state of this part of the case, then, amounts to this, that the late Mr. Thelluffon took *six existing lives* to experiment upon, adding such an *expectancy of further lives*, as fairly promised fifteen new lives, and might have produced twenty more, or even a greater number; and such as, notwithstanding the unexpected shortness of his life after his will, has  
actually



actually encreased the fix lives to *nine*. But if taking fix present lives and a *good chance of twenty or thirty lives more*, MERELY to extend executory devise, and enterprizing this great extension to exclude all beneficial enjoyment of his immense mass of devised property, are not sufficient overt acts of tampering with executory devise to elude it's limits, and to abuse it's indulgence, I know not, what sort of evidence of gross abuse of the rule of *lives in being*, short of some such monstrous experiment, as taking all the lives of all the royal family and of all the existing members of both houses of parliament, both in Great Britain and Ireland, or of all the lives in the several existing tontines within the two islands, can be adequate to convince the understanding, that the intent was to defraud the law, under which the testator's ambitious avarice takes shelter. His own scope would probably have gone even such vast lengths, and have attempted some such vast strides, as I thus mention. But his professional advisers were not so blind, as not to see, that such extremities would have completely betrayed the design of the testator. It may well be imagined, that their sagacity stopped the testator in his career; and that he became deterred by them from risking himself so deep in *experimental accumulation and experimental executory devise*. His not going further only shews, that he was sufficiently instructed to be afraid; and so became reconciled to being content with taking lives enough to give a *probable chance* of accumulation for almost a century, instead of attempting a *certainly* in that way. But it may be hence collected, that he was made conscious of his aiming at something irregular, something excessive; and so was prevailed upon by his advisers, to abstain from unmasking himself entirely. If he had not yielded something to their influence, the outrage upon the boundary of the rule of *lives in being* would have been too visible and gross to bear argument.

But



But I contend, that if he really meant to transgress in any degree, the penalty is incurred; and that his trust of accumulation and executory devise must pay the forfeit, as much as if the testator had trespassed more avowedly and more largely; and that it is no excuse, that he has veiled and abridged his purpose, in order to trespass more securely.

FROM these views of the rule of lives in being, and of the cunning of the testator in endeavouring to shelter his scheme under that rule, it will, I trust, appear,—that the rule of executory devise is far from allowing lives of any persons and in *any number*, without limitation or discrimination:—that whatever may be the extent of the *letter* of the rule, it's *real spirit*, it's analogy to *ordinary family settlements*, the *monstrous consequence* of taking *lives indefinitely*, and the *practice* upon the rule, all conspire to shew a boundary inherent:—and that the will of the late Mr. Thellusson, not only tampers with this part of the boundary of executory devise; but, notwithstanding all the cunning employed to veil his purpose and all his fear of trespassing so as to be discovered, stands convicted of a real encroachment.

FIFTH charge of excess of executory devise, namely, *protracting the executory devise, after expiration of the lives, till completion of all the purchases of land.*

I NOW come to my FIFTH charge against the trusts in question, so far as excess of the limits of executory devise is concerned.

BUT few words may be sufficient for the purpose of this charge. It speaks for itself. The short amount of it is, that though the will of the late Mr. Thellusson permits his beneficial



cial devisees to be individually ascertained, when all the classes of lives, which he constitutes to build accumulation upon, are exhausted: yet the will seems still to harp upon accumulation; and for the sake of adding a further link to the chain of his project, still to exclude actual enjoyment of the devised property. At least there appears an opening for so understanding the provision: for it directs, that until convenient purchases of land can be found, or until a sufficient sum of money shall be accumulated to make proper purchases of lands, the interest dividends and proceed of the stocks and securities constituting the testator's residuary personal estate, and its increase from the several sources of accumulation appointed by the testator, shall accumulate in the same manner and for the same purposes, as the rents and profits of the lands to be purchased under the will are directed to accumulate. This provision seems to be aiming *at all events* to continue the accumulation of the personal estate and its increase both from itself and the accumulating profits of the lands purchased and to be purchased, until purchases of land shall be actually effectuated; that is, without regarding, whether all the lives postponing the executory devise are or are not expired. In general, where money is to be laid out in the purchase of land for settlements, there is a provision, that till the lands shall be purchased, the interest of the money shall belong to the same persons as the rents and profits of the lands if purchased would belong to. But in the late Mr. Thellusson's will, the provision is against such an application of the interest of the personal estate and its increase, and for it substitutes a trust of accumulation. The effect of this provision then, unless there shall be found room *constructively* to make it determinable with the last of the various lives, which are made subservient to protracting the executory devises, will be to give the



the chance of a further and uncertain postponement of any enjoyment under them. In this view of the provision, if the *whole* of the personal estate and its increase from its own accumulations and those of the real estate should be uninvested in land, when the last of the various lives drops, the accumulation will continue for *the whole* of that fund during a new and uncertain period of protraction, that is, till proper purchases of land shall be found and completed; and the executory devisees, though become ascertained, will be forced to wait for enjoyment accordingly. If a *part* only of the same personal property and accumulations shall remain uninvested, when all the classes of lives are exhausted, then the enjoyment of only such part will be further postponed. But, from the nature of the case, every part of the immense personal property and its adherent accumulations is equally liable to be affected by this new protraction of the executory devise in point of enjoyment. Therefore if this new link of protraction be an excess of executory devise; if, from its succeeding such a series of existing and expectant lives, and from the uncertainty of its duration, this further postponement be sufficient to make it a trespass on the established boundary; I contend, that it will at least infect the trusts for all parts of the residuary personal estate and its adherent accumulations as well from the devised real estates as from its own proper fund, and consequently make the trusts illegal for almost half a million of the property in question. Nay, perhaps, the court may feel itself justified to consider the whole of the devised property as implicated in this charge of excess of executory devise, in respect that in point of actual enjoyment the whole of the residuary devise is affected by this further attempt at protraction.



MY SIXTH and LAST charge against Mr. Thellusson's will *for excess of executory devise is*, that not content with protracting his executory devises both in point of vesting and in point of enjoyment till expiration of all his classes of lives, and not content with farther protracting his executory devises in point of actual enjoyment till completion of all the purchases of lands he directs to be made with his vast funds of accumulation, the testator attempts the still farther protraction as well for vesting as for actual enjoyment, by making it uncertain, who shall be the lineal male descendants to take beneficially, till the very moment of actual partition amongst them, or rather till actual conveyance of the several allotments of lands in execution of such partition.

SIXTH and last charge of excess of executory devise, namely, *protracting it till actual conveyance for partition amongst the first beneficial takers.*

UPON this charge, I shall say very few words.

IT depends upon the construction of the word *then* in the clause which appoints how partition shall be made. That clause directs, that after the decease of the last of the lives for protracting the executory devises and the concomitant accumulation, an equal partition shall be made by the trustees, by dividing all the lands into lots of equal value: -to effectuate which, in the case of such vast estates as must in any event be the subject of the valuation and division, much time must necessarily be consumed. This direction to divide the estates into 3 lots is followed, with ordering, that the premises in one allotment *shall be conveyed* to the use of the eldest male lineal descendant *then living* of the testator's eldest son: and the like phraseology is made use of as to the two other allotments for his two other sons.

Now I contend, my Lord, that by the words *then living* the testator means living at *the time of the conveyance of the allot-*



*ments*: and if this be so, I conceive, that it amounts to protracting the executory devises accordingly. I submit also, that thus extending, the contingency of the enjoyment and vesting, for a time so uncertain beyond the duration of all his classes of lives, is a clear excess of the boundary of executory devise.

HERE the question is, whether the testator actually intended such a farther protraction. The literal construction, on the rule of relation to the last antecedent, is, I apprehend, clearly for so understanding the testator. His scheme, of stretching executory devise to its utmost limits, is also for the same construction. Nor are the gross and mischievous purposes, for which the testator constitutes his executory devises, small temptations, to consider his words according to literal construction, and to take advantage of them.

IT is for the other side to shew, and for the Court to judge, whether there is enough to encounter this head of charge against the trusts in question.

I WILL not now press this charge further. But I think it just to add, that it doth not originate with me, but comes from the gentlemen, who are concerned <sup>as solicitors</sup> for the Thelluffon family and against the will, and who have I am convinced discharged their duty in that respect with exemplary zeal, and who have had no small share in encouraging my exertions in the present case, such as they are. I beg leave also to say, that the charge thus suggested by others appears to me to deserve very serious attention, and that I therefore submit it to the disposal of your Lordship.

I HAVE



I HAVE now travelled over all the six charges I make, against the will of the late Mr. Thellusson, for exceeding the boundary of executory devise. All of the charges appear to me to deserve consideration.

EVEN the imputation, of his meaning covertly to comprehend the twenty-one years after his decease for the generation and birth of new lives to protract his executory devises, which is the subject of the SECOND charge,—the imputation of his intending to protract his executory devise in point of enjoyment, under the chance of it's remaining to purchase lands when all the lives shall be expired, which constitutes the FIFTH charge,—and the imputation of intending a still further protraction, under shelter of the direction to make partition, which constitutes the SIXTH and last charge,—appear to me charges very far from being such as to justify me in passing them over.

AS to the FIRST of the six charges; which imputes to the will having left the third fourth fifth and sixth classes of the lives for accumulation, or at least the third class, unguarded by the restrictive words at the close of the seventh and concluding class; and which, in respect of the consequential letting in various future lives in some degree indefinitely, will, if well founded, shew a clear encroachment of the rule limiting the contingency of executory devise to lives in being and twenty one years after:—I have great confidence, that, the gross unmeritoriousness of the trusts being considered, there will be found fully sufficient on this head alone to invalidate the trusts in question.

BUT as to the THIRD charge, which imputes to the will,



taking the 9 or 10 months twice over, and at the same time superadding collectively the lives of issue in the womb at the death of the testator, and born to his sons and grandsons and even to great grandchildren in due time afterwards; I conceive, that I have not only with me your Lordship's doubts and the reasoning of the King's Bench in the case of Long and Blackall which those doubts produced, but that the charge is in it's nature unanswerable.

NOR, as to the FOURTH charge, which depends upon the consideration, whether it is allowable, under the rule of lives in being, to take the lives of all or any persons indefinitely; and whether if it is a fraud upon the rule to constitute a large collection of lives to ensure spinning out executory devises beyond a century, the late Mr. Thellusson has not sufficiently tampered with the rule in that way, to convict the will of that fraud, and to annul it's cruel and unnatural trusts upon that ground only:— have I the least idea, how the reasoning adducible to support it can be thoroughly answered, either on the spirit of the rule of lives in being; or on the sense in which our courts have understood it; or on the practice under the rule from it's first establishment till the present moment, except in the single and recent instance of the eccentric and experimental will now in question.

Second general head of objection to the trusts, namely, the charge of excess of trusts of ACCUMULATION.

HAVING explained and argued all the several charges against the grand trust of the will of the late Mr. Thellusson, which are comprehended in my first general head, and have their foundation in the line or boundary prescribed by our courts of justice to executory devise, I shall next proceed to my second general head of argument against the same trusts.

HITHERTO



HITHERTO I have impeached the trusts, *for exceeding the limits of the rule of EXECUTORY DEVISE*, and as being therefore invalid, on account of no less than six several trespasses upon that rule.

BUT now I am to impeach the same trusts for a vice independent of excess of the boundary, by which the wisdom of our Courts gradually circumscribed executory devise, as they gradually indulged it.

HERE the vice, which I impute to the trusts, is posthumous accumulation, in such a *monstrous excess* and for such a *monstrous purpose*; as not only to be unworthy of shelter, either under the law of executory devise, or under any description of existing law whatever; but even to require being disdainfully rejected, as amounting to a precedent of testamentary disposition, which it would be equally a dangerous shock to the interests of the country at large and a reproach to its law and judicature to tolerate.

IT is a circumstance very material to this second general head of attack upon the trusts in question, that the will cannot be extricated from all the imputed excesses of executory devise; except under the terms of administering vast assistance to the argument against the trusts upon the single and independent ground of excessive accumulation, by reason of the consequences, which overruling some of my chief objections of trespassing upon the limits of executory devise, and disregarding the principles upon which I have endeavoured to enforce those objections, would produce.

IF the will of the late Mr. Thelluffon should be acquitted of all trespass upon executory devise, it will follow, I conceive,—  
that



that executory devise may depend upon the contingency of *any number of existing lives at the death of the testator, without limitation of any kind whatever*;—that the contingency may be further extended to *the lives of an unlimited number of persons* IN THE WOMB of their respective mothers at the same time;—and that still further to enlarge the stock of lives, the contingency may include twenty-one years, from the death of the survivor of such unlimited number of lives of such *existing* persons and of such persons *in the womb*.

BUT if these consequences are to be the result of overruling my objections to the legality of the late Mr. Thelluffon's executory devise, it tells strongly indeed against the accumulating trust, with which his executory devise is coupled. It will elevate and extend executory devise. But it tends to depress and abridge trust of accumulation; for it will go far, I should think, towards proving, that executory devise and trust of accumulation should not be suffered to consubstantiate, should not be suffered to be made co-equal and co-extensive; or in other words that trust of accumulation ought not to find shelter in executory devise by being incorporated into it. Upon the doctrine and principles, which I have resisted, but which must be adopted, if the late Mr. Thelluffon's executory devise be adjudged within the due boundary, it will be possible, that by tontining upon such an expanse of contingency from an unlimited number of lives of persons existing and persons in the womb and 21 years beyond, as I have described and in the manner I have exemplified under my first general head of argument, a skilful doctor in the art of executory devise may apply it, so as *with certainty to keep property unalienable for a century and twenty-one years at least*. Nay, by shaping the executory devise, so as to let in no person  
under



under it, but such as shall be of the age of a few months when it shall take effect, there will be a further gain of above twenty years to the period for keeping property *unalienable*; and *so property may be made unalienable to a certainty during more than one hundred and forty years*. If too trust of accumulation should be allowed to couple with executory devise, and to be made commensurate in duration, the same effect will be produced as to keeping property unusable. Thus executory devise may with certainty be applied *to prevent ALL ALIENATION of property for almost 150 years*, and with the adjunct of accumulation *may be made with equal certainty to prevent ALL BENEFICIAL ENJOYMENT during the same great length of time*. Thus assisted also by accumulation, executory devise—which our courts professedly indulged merely for the *general convenience* of a species of entail applicable *to all kinds of property*, and in *analogy* to the unbarrable duration of the regular kind of settlement by estates for life and remainders over in tail,—and which therefore our judges have considered as not probably calculated to render property unalienable for more than half a century,—would become manufactured into an engine, for laying such an embargo on *the use of property both real and personal throughout the kingdom, as to make it possible to prohibit all beneficial enjoyment for 120 or even 140 years*, with as much CERTAINTY, as if such long term of years was expressly assumed for the purpose.

FROM this view of the effect, which would result from grafting trust of accumulation upon executory devise, under the principles and extensions, upon the terms of which only can the late Mr. Thelluffon's executory devise escape (if it can escape on any terms) the being condemned for excess of the prescribed boundary; it is apparent, that such a combination  
of



of trust of accumulation with executory devise could not be endured, without the most glaring and dangerous mischiefs to the community. It would enable every miserly person, every unfeeling person, every resentful person, every capricious or humourous person, every person philosophically though not legally insane; if he possessed any thing, however great in value, which could be made the subject of settlement taking effect on his death; to stagnate the use and enjoyment of the wealth of the kingdom at his pleasure for a century and almost 50 years beyond; and so to erect a mausoleum of property, for the almost boundless gratification of private vanity and private aggrandisement. It would enable this, at the expence of the commerce, the circulation, the revenue, the strength, the resources, the hospitality, the comforts, the literature, the science, the morality, the government, the constitution, nay, the very existence of the kingdom: for how can all these things continue, if every individual is to be at liberty, by testamentary disposition, to interdict the use and enjoyment of his property, by a trusteeship of accumulation for a century and more after his own death?

The destructive consequences, to be expected from allowing such an extravagant indulgence of posthumous avarice, may be well exemplified, by reference to the vast property, destined by the will of the late Mr. Thellusson to build a monument to his avaricious and unnatural project of sordid fame. The fortune, which his will appropriates to accumulation, may be taken at the capital sum of £. 600,000. which is about the real value; and if continually employed by the year *at* compound interest at £. 5 per cent, it would double the capital in 14 years, and so progressively afterwards. But even  
upon



upon a calculation of 15 years for so doubling the capital, the effect would be as follows :

The capital would be, in

|                    |              |
|--------------------|--------------|
| 15 years . . . . . | £ 1,200,000. |
| 30 . . . . .       | 2,400,000.   |
| 45 . . . . .       | 4,800,000.   |
| 60 . . . . .       | 9,600,000.   |
| 75 . . . . .       | 19,200,000.  |
| 80 . . . . .       | 25,600,000.  |
| 90 . . . . .       | 38,400,000.  |
| 105 . . . . .      | 76,800,000.  |
| 120 . . . . .      | 153,600,000. |

ACCORDING to this calculation, therefore, if the principles, on the terms of which only, as I have before observed, the trusts in question can be extricated from excess of the limits of executory devise, are to be allowed, the accumulation, under that shelter, would at the end of ninety years, which is at least 30 years short of the full extent of the duration possible to be ensured on the full extent of those principles, constitute a fortune of nearly 13 millions a-piece for such of the three male descendants of the late Mr. Thellusson's three sons, as at the expiration of that term should fall under the description of his will ; and if there was only one such descendant, it would be £ 38,400,000. Consequently if there were three descendants to take, each, at an interest of five per cent, would have an income of about £ 650,000. a year ; and if there was only one such male descendant, he at the same rate of interest would have a yearly income of above £ 1,900,000. that is, more than double his Majesty's civil list revenue. Even at 75 years,

X

each



each of the three male descendants would, on the same rate of calculation, have a capital of above six millions a-piece, and from that capital a revenue of above £ 300,000. a year; and if there was only one such descendant a capital of £ 19,200,000. and from it a revenue of above £ 900,000. a year, that is, a greater income than is allowed by parliament to the King of Great Britain, according to the civil list in it's present and highest state of advancement.

THIS statement presents such an enormity of effect from accumulation made commensurate with executory devise, as seemingly to make it a waste of words, to describe the ruinous consequences of so indulging posthumous avarice. Indulged to the will of Mr. Thellusson only, the public mischief from the stagnation of £ 600,000. would be of an alarming magnitude in every point of view. On the one hand, there would be erected a monument, to commemorate his rapid acquisition of a vast fortune, and his abuse of the testamentary power; by sacrificing that fortune and the interests of all his living and dearest relations and his and their issue for two or three generations, to a selfish and unfeeling vanity; and for that purpose by his locking up his immense property in the chest of accumulation *irrevocably* for many years above a century, and so accomplishing, what no miser ever before accomplished, a plan, by which the *income* of property may be locked up from expenditure as well as the *capital* for several generations after his own death. On the other hand, during the same long period of posthumous accumulation, there would be a continual injury of a most extensive operation, starving the commerce, shrinking the revenue, and choking the circulation of the wealth of the country, by denying to it at the beginning all expenditure of almost a million of

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money;



money; and this mischief would be progressively encreasing at a ratio, which, after comprizing millions and tens of millions, would, before the end of the period of accumulation and non-enjoyment, amount to above 150 millions of property in value. Nay, if lands were purchased from time to time, as the will of the late Mr. Thellusson directs, this monstrous evil would be aggravated, by *monopolising* the landed estates of the kingdom to the value of millions and tens of millions, into the condition of property without even the *possibility* of any expenditure, till the century or rather the 125 years of non-enjoyment shall be completely expired. Such an indulgence, in the single instance of the late Mr. Thellusson's fortune, would be the cause of public mischiefs of a vast and alarming magnitude. But these mischiefs would not stop there. What is indulged to his will or testamentary settlement, if such instruments are to be called by such a name, must be indulged to the wills and settlements of others: and so all kinds of property, in all parts of the kingdom, would be liable to the same embargo upon and proscription of all beneficial enjoyment; and in proportion as posthumous avarice should become fashionable, the landed estates and the personal property of the whole country might be brought into a condition of *posthumous and therefore irrevocable non-user and non-enjoyment for any beneficial purpose whatever, during as long a space of time as executory devise can be wire-drawn to include.*

ACCORDING to these views of the pernicious consequences, which would be incident, to allowing trust of accumulation to be consolidated with executory devise, to the extent of the latitude, necessary to be conceded to the latter, if the will of the late Mr. Thellusson is to be supported; to sanction the



trust in question would be establishing, not merely a precedent against *public good* in a *common way*, and upon common *probability*, but a precedent so much against public good as to engender a CERTAIN *public calamity*.

INDEED the late Mr. Thelluffon has not ventured to go all the lengths of accumulation, which executory devise, in the latitude of principle requisite to sustain his trusts, would allow. But if those principles should be judicially sanctioned, a future Mr. Thelluffon will be encouraged to *tontine* upon the conjunction of trust of accumulation and executory devise to the utmost stretch of such latitude. Even the present time will probably furnish some Thelluffons in extent of fortune, and very many in extent of avaricious vanity and unfeelingness; and should a decree be made to execute Mr. Thelluffon's scheme of posthumous accumulation, there will be no room for those apprehensions, which alarmed him; and what he tampered with, others may execute unhesitatingly, and in the fullest latitude the principles of such an adjudication would admit, and so openly refine the practice of executory devise and trust of accumulation combined, into the most extended tontine of accumulation such a conjunction will allow.

BUT for the purpose of the present argument there is no occasion to resort to that extremity of public mischief, which might result from combining executory devise with trust of accumulation, to the extent of the principles, upon which only the late Mr. Thelluffon's executory devise can be sustained. The incidental public mischief, even upon the rule of executory devise under the limitations as I understand them, is I conceive, far greater than is necessary to exclude such



such a combination. I allow, that so confining executory devise to its proper limits, as I see the boundary, greatly reduces the quantum of the evil. Though it denies to posthumous accumulation the means of extending it with *certainty* to a century and a quarter; yet it leaves very probable means of protracting accumulation for half a century, that is, during a life in being, or several lives, not being mere faggots to feed the avaricious fire of executory devise, and twenty-one years beyond, with nine or ten months more; or at least leaves the compass of one life however foreign to the provisions, if any life can be used for the mere purpose of protracting executory devise. But under this reduction, the public evil would be monstrously great. Still there would be a monstrous scope for posthumous accumulation. With every man having a capital of £ 600,000. the computed amount of the late Mr. Thellusson's beginning fund of accumulation, there would be an opening, through accumulation and executory devise, to keep millions out of circulation, and to proscribe all beneficial enjoyment of such millions, till a fortune of seven or eight millions should be saved, and, in case of the accident of a minority of twenty-one years at the end of the executory devise, a fortune of about 17 or 18 millions.

Thus, under the most strict interpretation of the boundary of executory devise, it will be impossible to permit trust of accumulation and executory devise to be co-durable, without an opening for the most dangerous mischiefs to the country at large, at the pleasure of every testator, whose hard-heartedness shall prefer the unnatural gratification of posthumous avarice to the natural proper and becoming disposition of his fortune.

IN



IN these views, therefore, of the unavoidable consequences of allowing trust of accumulation to be grafted upon executory devise, there arise some very potent objections to the validity of the trusts in question.

IF the trusts in question are sustainable, it must be under an exercise of various powers, all of which are conferred by the law or indulged by the judicature of the country; namely,—the *general and strictly legal testamentary power*,—the *particular and indulged power of executory devise*,—and the *permitted power of creating trusts*.

BUT every one of these powers exists under limitations wholly inconsistent with sheltering trust of accumulation under executory devise.

THE *general testamentary power* was given, in order to enable those, who have acquired property, to appoint, who shall succeed them in the use and enjoyment, and under certain limitations to constitute entails. But it is the aim of trusts of accumulations, such as the trusts in question, not to regulate use and enjoyment, but absolutely to stop and prevent them; nay, under the combined shelter of trust and executory devise, to do so during such a number of lives, as in *possibility* gives a chance of continuing the prohibition of beneficial enjoyment for a century, and even in the events which have happened leaves a great probability of duration beyond sixty years. In other words a power entrusted for general convenience is applied to produce a general mischief.

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THE *particular power of executory devise* emanated from an exercise of discretion by the courts both of law and equity. Executory devise was their joint production. Though it was against the genius of our law, and almost against its precepts, our courts indulged it. However the indulgence was expressly meted out for general accommodation. But by the trusts in question, it is attempted to make executory devise an instrument of general injury.

LIKE executory devise, *trust* was almost a stranger to our common law; and it long existed only at the mercy of the conscience of the party entrusted. At length our courts of equity for the sake of general convenience adopted trust, under the implied reserve of a discretion not to allow it for any unmeritorious purposes or against public good. But the trusts in question aim to gratify the fanciful avarice and the ambitious vanity of the individual testator, in an extensive scheme of posthumous accumulation; not only in breach of his duty as a parent and husband, and in despite of his dying professions to a numerous unoffending and attached family; but even to the danger of inflicting calamity upon the community at large.

UPON these grounds, then, I insist, that the pernicious scheme of accumulation, which it is the project of the late Mr. Thellusson's will to substantiate, so infects the trusts in question, as to place them wholly out of the reach of all shelter; either from the testamentary power; or from executory devise; or from that jurisdiction over trusts, which is the peculiar province of our courts of equity. So probed, and contrasted, the trust of accumulation, with its dependent executory devises, is so monstrously against public good,

as



as to threaten public calamity, if the precedent should be established; and is therefore equally out of the compass of general testamentary power, and out of the shelter of executory devise and of the jurisdiction over trusts.

BOTH our courts of law and equity have been often called upon to condemn upon the principles of public good and public inconvenience. Upon those principles, they reject customs, they reject conditions, they reject covenants and agreements. But if the view I have exhibited of the trusts in question, in respect of the consequence of mounting trust of accumulation upon executory devise to accomplish purposes of the most unmeritorious description, be in any moderate degree founded; there is more than a common call upon a court of equity, to reprobate the trusts in question; and to condemn them, not merely as privately cruel and unnatural, but because they are also so pregnant with the most dangerous mischiefs to the public interest, as to be wholly out of the shelter both of executory devise and of trust. There is even such a peremptory call, as to render it an indispensable duty to prevent their being carried into execution.

TRUST of posthumous accumulation in any extent I take to be rather a novel practice. I doubt, whether it can be traced much earlier than the commencement of Lord Hardwicke's administration of equity. I take it to have been unknown long after Lord Chancellor Nottingham's time. Had it been early attempted to make it an adjunct to executory devise in the smallest degree, probably it would have checked the establishment of executory devise itself. But my present conjecture is, that posthumous accumulation was an *after thought*. In strictness, I should even say,



that such posthumous trusts, for aggrandising families prospectively by suspending all beneficial enjoyment, ought not to have been in any degree countenanced by courts of equity; without whose aid all posthumous accumulation would be wholly impracticable.

THERE is a sort of invincible necessity in permitting the owners of property to be misers, that is, to be poor and miserable to the utmost extreme during their own lives. Whilst they live, there is a *possibility* of expenditure. But if they were to be enabled by a court of equity to entail their fordid system to the extent of trust in the nature of executory devise, an alleviation of the mischiefs of avarice would become impossible: for after the miser's death there would be no person authorised to relax from the accumulation; and it is not in any degree requisite, that a court of equity should pander to the continuation of avarice after the miser's death.

HOWEVER, somehow or other, the practice of posthumous accumulation has, I confess, insinuated itself. During *infancy* and *insanity*, such a trust is scarce more than a restraint upon expenditure almost necessarily incident to the situation. Hence perhaps a trust for the same purpose escaped observation. Passing this over might lead to attempting the thing, for a short time after, and in a way independent both of minority and mental incapacity. Thus I conceive, that insensibly, as it were, trust of accumulation obtained some sort of footing. At length, I believe, that even respectable lawyers have been led to suppose it allowable to annex trust of accumulation to executory devise, as if they were of the same nature. And this notion may have been encouraged by the cases, which have settled, that, on an executory devise of *personal* estate, the profits between



the death of the testator and the vesting of the executory devise, shall accumulate for the benefit of the executory devisee, where the will is without any other disposition of them; and that even for *real* estate, if the devise be of a *residue*, the force of that word is sufficient to produce the same effect. (z) But the point of allowing the same latitude to trust of accumulation as to executory devise, as far as I know at present, has never been regularly debated. (a).

INDEED, in the case of Mr. Bradley's will, to which I have before adverted more than once, there was an opening for arguing the point on behalf of his next of kin. But it became unnecessary to debate any thing on their behalf: Lord Thurlow instantaneously questioning the whole trust of the will; and, after hearing the then Attorney General in support of the trust, decreeing for the next of kin, without calling for any argument in their favour. Had he decided against them, or called for argument on their side, it might have led to discussing the point, whether trust of accumulation may not be made co-extensive with executory devise: for the will of Mr. Bradley seems to have been framed, with a view to experiment in that way, by directing a trust of accumulation from the moiety of the yearly income of a capital of about £30,000. in value, for 30 years, and then a trust of accumulation for a smaller portion of the same yearly income for sixty years

(z) The doctrine and chief cases on this subject are collected in Mr. FEARNE's Essay on CONTINGENT REMAINDERS and EXECUTORY DEVISES. See pages 434 to 439. of that excellent work. There are some additional cases in Mr. Powell's late edition of the part on EXECUTORY DEVISES.

(a) The strongest case of this kind, I have met with, is Lord Camden's decree in Phipps v. Kelynge, as stated in Mr. POWELL's edition of Mr. FEARNE's book on EXECUTORY DEVISES. See page 83, and in the note. But no account is given of any argument on the point, whether ACCUMULATION may be carried as far as EXECUTORY DEVISE can be extended.

more.



more. By thus qualifying and dividing his trust of accumulation; and by making the accumulation subservient to a trust, to buy such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind, and to distribute such books in Great Britain and the British dominions; and further by referring it to the wisdom of the Court of Chancery to carry this charity, as Mr. Bradley called it, into execution; the learned and acute apathist, who made this experiment, on the combination of accumulation with executory devise one of the latest acts of a long life in the line of a provincial conveyancing counsel, probably thought, that he should succeed in thus disgracing trust and executory devise under the color of religion and morality; or at least that he should carry his point to the extent of his first stage of accumulation, namely the thirty years. But Lord Thurlow required to know, what could be urged in favour of so strange and vague a trust; and having heard what duty extorted in its behalf from an amiable and able advocate the then Attorney General, his Lordship briefly and indignantly annulled the trust as unfit to be executed, and decreed the property to the next of kin to Mr. Bradley. Whether Lord Thurlow meant to include an opinion against making trust of accumulation and executory devise commensurate, I dare not undertake to say. But I should not wonder, that an understanding, so masculine and so endowed, should have reached the point without the process of argument. At all events this case on Mr. Bradley's will cannot possibly be used, in favor of constituting the same extensive boundary for trust of accumulation as is established for executory devise. Much less can that case be so used for trust of accumulation under such principles of latitude, as those, upon which only the trusts in question, even considered as mere executory devise, can be supported.



THE truth, I believe is, that *it remains to adjust the boundary of trust of accumulation*; and however in future that boundary may be adjusted in other respects, I should hope, that both the public interest and the honor of the law of the country will prove amply sufficient, to prevent applying the latitude of executory devise to trust of accumulation. Executory devise is the mixed progeny of our courts of law and our courts of equity. Trust is the child of our courts of equity. Both courts are deeply pledged to defend the public against all abuse of executory devise; and our courts of equity are as much bound to guard the public against injury from the abuse of trust. But I conceive, that the most insufferable abuses and the most injurious effects must be the result, if ever the time shall arrive, when executory devise and trust of accumulation shall be confounded, by an adjudication allotting the same large boundary to the former, as is settled for the latter, even under the limitations for which I have contended to prevent its excess. It is one thing to allow a period for the duration of an entail keeping property *unalienable*. It is another thing to allow a period for a trust making property *unusable* and unenjoyable. Lives in being and twenty one years beyond may be a reasonable and proper allowance, as a period for enduring the unbarrableness of entail; and yet be an allowance quite intolerable for enduring prohibition to use or enjoy property. I hope, that I shall never see judicial sanction given to such an abuse of executory devise, as shall bring trust of accumulation within the same latitude of limits. At least I trust, that if such an adjudication shall pass, it will not be in a case like the present one; for it will not, I apprehend, be found possible in the present case to annex executory devise to trust of accumulation, without a dangerous extension in point of principle to the latitude of executory devise, and



and at the same time making that extension to sustain a testamentary disposition so unmeritorious, that to countenance it, may cause reproach both to English law and English judicature.

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I NOW come, my Lord, to my *third and last general head of objection* to the testamentary trusts in question.

HERE my objection is, that the beneficial trusts, constituted by the will of the late Mr. Thellusson to commence when his ambitious proscriptive trust of accumulation is made to cease, are so vague and obscure as to be rejectable for uncertainty.

Third and last general Head of Objection to the Trusts, namely, *uncertainty in the description of the primary beneficial devisees, and of the succession to and after them.*

THE objection, I have to offer in this respect, appears to me to deserve a very serious consideration. But from the nature of it, I hope to be able to explain myself on this part of the case in a very brief manner.

THE objection arises from the particular language, in which the testator has thought fit to describe the beneficial devisees appointed to take under the partition he directs to be made, when the trust of accumulation shall be determined.

THE trust for this purpose orders a division of the estates into three lots of equal value, and that one of the lots shall be conveyed to the use of the *eldest male lineal descendant then living* of his eldest son in tail male: and the direction for the first limitation of use of the two other lots in favor of the male descendants of the two other sons of the testator is in the same language.

BUT I beg leave to insist, that this very outset of the beneficial trusts is a chef d'œuvre of obscurity.

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THE testator, by *eldest male lineal descendant*, may mean the eldest of that description *in point of age*, without in any degree regarding heirship to his eldest or other son. This indeed seems to be the most literal interpretation. Yet that he should disregard heirship, and thus wholly look to age, is not very probable.

BUT he may mean by *eldest lineal male descendant*, such descendant, as should be *heir male* of the body of each son, and be both *very heir*, or *heir general*, and *male*.

HE may also mean, by *eldest male lineal descendant*, an *heir male*, as usually opposed to an *heir general*.

HERE then are *three* uncertainties, of such a nature, that the will becomes very like a devise to A. B. or C. But if the devise was literally so framed, would the Court undertake to guess, what the testator intended? Would not the Court rather say, that the devise was too uncertain to be interpreted; and that if testators will exercise the testamentary power enigmatically, it is fit, that the will which the law makes for them, where they die intestate, should prevail?

BUT this *triple* uncertainty, who is meant by *eldest male lineal descendant*, is not the only uncertainty of the description. This shews the uncertainty as to *person*, when the time of taking comes. But there is another uncertainty, namely, of *time*, when the description shall attach. In this respect the uncertainty is even *quintuple*. The testator might mean the *eldest male lineal descendant* at *the very moment the trust of accumulation shall cease*. But his words are so equivocal, that he might mean any one of *four other times more distant*, that is,—*when all the accumulated monies shall be in-*  
vested



*vested in lands,—or when those lands shall be valued,—or when they shall be allotted for partition,—or when the conveyance of partition shall be executed.*

THUS, from the testator's anxiety to continue the secret, who were to take beneficially, to the very last moment; and so to make his executory devise secure against all alienation till the moment of actual enjoyment shall arrive; he was tempted to express himself so darkly, and so to wrap up his meaning, that only *four* words are open to *eight* uncertainties. In short, it seems as if, after excluding *every body* for a time, which may be seventy or even an hundred years, he was determined at last to leave his estate to *nobody*.

NOR is this complication of uncertainty, in the outset of the beneficial trusts, the whole extent of the obscurity which pervades them. Both in the remainders in tail male to the second and every other male lineal descendant of each of the sons, and in the cross-remainders of entail as between the uncertain male descendants of the testator's three sons, the same strain of ambiguity, or rather of unintelligibility, prevails. It is uncertainty upon uncertainty, or rather one aggregate of uncertainties upon another. Indeed it could not be well otherwise; for the *octuple* uncertainty in the *descriptio personæ*, with which the description begins, is necessarily continued, to make the several branches of the enigma consistent, and to make the mystery all of a piece. Accordingly there is an uniform repetition of or reference to the vague words *eldest male lineal descendant*, with a continuation of the vague words *then living*, to the end of the chapter of this enigmatical part of the will. In other words, it is the will of *octuple* uncertainty at least *three times three*.



THE question then is, whether this accumulation of obscurity and equivocalness will not justify the court, in treating the beneficial trusts for the eldest male lineal descendants of the three sons, as too *uncertain* to be properly carried into execution, and therefore as void.

I AM perfectly aware, that it is the duty of judicature to do its utmost, to give effect, to last wills, and to conveyances of every description; and that it both is and ought to be an arduous thing, to prevail in an attempt to nullify instruments for uncertainty.

BUT our courts do sometimes go the length of rejecting, not only *wills*, but even *deeds* and *agreements* for uncertainty. There are precedents of this both at law and in equity.

IN Viner's Abridgment, title *Devise*, letter *D.* there is a large collection of cases of this description on *wills*; and in many of them devises and legacies appear to have been condemned for uncertainty.

THE Abridgment of Equity Cases, under the same title, furnishes some precedents of devises, void for uncertainty either in the description of the thing or of the person of the devisee or legatee; and the same subject is taken up, with some additions, in the title *Legacies and Devises*, in the new edition of Bacon's Abridgment, which well deserves to be entitled an improved edition of that useful and in some parts very able work.

IN Viner's Abridgment, title *Grant*, letter *R.* there is a collection of cases of *grants* void for the uncertainty of the  
 5 thing



thing granted; and some other branches of the same title furnish matter of a like kind: and Bacon's Abridgment, under the same title, letters *C.* and *F.* contains much matter explaining where a grant shall be void for uncertainty.

IN Coke upon Littleton, fol. 20. b. there is the case of the gift to A. for life, remainder to B. in tail, remainder to C. *in formâ prædictâ*; in which this last remainder was held void for uncertainty.

IN Corbet's case, 1. Co. 84. b. and 85. a. Lord Anderfon, after citing a case, in which a condition enlarging a lease for life to a fee was held utterly void for uncertainty, accounts for it, by observing, that judges ought to know the intent of the parties by certain and sensible words, such as are agreeable and consonant to the rules of law; and then he puts a further case of grant, which was adjudged void for the uncertainty and insensibility.

LORD Vaughan, in his Reports 176, concludes his judgment in Crowley and Swindley, for rejecting a clause of distress, by saying, that words being insensible ought to be rejected.

IN Bromley and Jefferies and others, 2. Vern. 415, Lord Chancellor Somers refused to decree specific performance of an agreement, partly because it was uncertain.

THERE are also recent precedents of rejection for uncertainty.

IN the case of Leslie and the Duke of Devonshire, 2. Bro. Cha. Cas. 188. Lord Kenyon, whilst Master of the Rolls, held

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a bequest



a bequest of some mortgages, which were so devised, as to refer to two sets of limitations of two other estates, without specifying which set was meant, too uncertain to have effect; and observed, that where the Court cannot see it's way, the property should be considered as undisposed of.

IN Thomas against Thomas in 6. Durnford and East 67. a devise was held void by the Court of King's Bench for uncertainty in the description of the devisee.

IN the third volume of Mr. Vesey's Reports, there is your Lordship's judgment in the great case on the *mutual wills* of the late Horace Lord Walpole and his great nephew the Earl of Orford; and I collect from it, that your Lordship refused to enforce the alledged contract of mutual will between the two testators, very much under the impression of the contract's being too vague and uncertain.

IN the case on the will of the famous conveyancing counsel of the North the late Mr. Bradley, your Lordship's great predecessor Lord Thurlow, as I have always understood, considered the object of Mr. Bradley's experiment of a trust of accumulation, as too vague: and though the testator, not only cunningly referred himself to the discretion of the Court to assist the mode of executing his trust; but cunningly divided it into parts, so as to give the better opportunity of having the benefit of the *cy près* doctrine of this Court; yet Lord Thurlow refused to modify the trust and so to purge it of it's vague properties; and refused to execute the trust even in the smallest degree.

FROM



FROM these precedents it is plain, that contracts, deeds, wills, and instruments of every sort, may be rejected both at law and in equity for uncertainty.

HERE then the point is, whether the uncertainties I impute to the trusts in the present case are deficient either in *quantity* or in *quality*.

UPON this point, we ask the judgment of your Lordship; not in the case of a will of honourable intention; but on a will of proscription, a will against nature, a will against the publick good in a monstrous degree; on a testament, not only *inofficiosum* to the family of the testator, but *inofficiosum* to the public at large; on a will contrary both to private duties and to public interest.

I TRUST, that such a testamentary disposition will not be assisted by this Court, without a necessity the most invincible.

I TRUST, also, that the consequence of thus refusing to <sup>have</sup> ~~stamp~~ the beneficial trusts for the male descendants of the three sons of the testator, will not be, to let in the trust towards paying off the *national debt*; and so to convert a victory over the testator's executory devises and trusts of accumulation for remote male descendants, into a complete disinherison of his whole family, both present and future. There are indeed, cases, both of remainders (*b*) and executory devises, (*c*) which have been held to operate immediately, where the preceding estates have failed taking effect. But

(*b*) See Fearn on Conting. Rem. and Exec. Dev. 3d ed. 163 and 234. and the additional cases in those parts of 4th ed.

(*c*) See Fearn on Conting. Rem. and Exec. Devise, 3d ed. 399. and the further matter in that part of 4th ed. in the volume edited in 1795, with additions by Mr. Powell.



I submit, that there is not any room for applying such cases to the will in question. In this respect the will of the late Mr. Thelluffon is particularly constituted. According to the settlement, his will directs of the vast landed estates, which it was his project to accumulate for remote lineal male descendants of his three sons, there is to be inserted, after the remainder in tail male to an only male descendant of the three sons, in case of there being but one, a *remainder* to the use of the trustees in fee. But this ultimate remainder is not *immediately* and *simply* upon a trust to sell the lands for the use of the sinking fund. On the contrary, by the will, the trust for the sinking fund is made the subject of a subsequent and distinct clause, and in that is *expressly* and *pointedly* directed to take place UPON FAILURE OF MALE LINEAL DESCENDANTS of the testator's three sons AS AFORESAID. Therefore to let in the trust for the sinking fund, whilst any such male lineal descendants are to be found, would be, against the most express language of the testator: and would be to construe a *distinct* and *substantive* trust for the sinking fund upon the contingency of *failure of lineal male descendants* of the three sons, as if the trust was constituted without any such contingency annexed; and so to deprive the heir and next of kin of the benefit of the only case, in which the will omits to exclude them. The testator cannot be supposed to have foreseen, that the settlement, he directs to be made upon the lineal male descendants of his three sons, would be disappointed by the uncertainty of his own language. The case, then, in this respect is left unprovided for by the testator. Unless, therefore, the Court should undertake to supply the omission for him, the trust for the sinking fund becomes in effect the same, as if it was simply and unconnectedly on a *general failure of issue male* of the three sons, and so under the rule of executory devise absolutely



absolutely void. But will the Court undertake such an office for the testator against his heir widow and children; merely because the unnatural spirit of the will may justify conjecturing, how the testator, if he was living to supply the omission, probably would have arranged the matter between the sinking fund and his family (*d*)?

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At length I reach the conclusion of my arguments against the last will of the late Mr. Thelluffon, so far as it affects the grand bulk of his vast fortune, and so far as it is now under consideration; that is, so far as the will excludes all his existing unoffending family from his general real property and from his residuary personal estate.

Conclusion  
of the Argu-  
ment.

THE result of the whole, as I see the case, stands nearly thus.—The trusts of the will are impeachable for various *dangerous excesses of the boundary of EXECUTORY DEVISE*.—Of the excesses imputed, those the most clearly proveable are such, as make the *irregular and barely permitted* entail by EXECUTORY DEVISE a CERTAIN mode of keeping property of every kind *unalienable* for nearly *a century and a half*: and if this be permitted, a mode of entail, the permission of which originates from the *discretion* of the courts of Westminster Hall, will in duration be greatly elevated above and greatly extended beyond the *ordinary and strictly legal mode of entailing inheritance*; that is, in the proportion, which the

(*d*) See in 3 Ves. Jun. 317. the case of Holmes and Craddock, which is a late decision of his Honour the present Master of the Rolls, against speculating to abridge the contingency of a legacy to the prejudice of an heir: and see several other cases of a like kind there cited.



*certainty* of almost a century and a half bears above an *uncertainty* not in *probability* reaching above *fifty or sixty years* and never free from *instantaneous determination*.—If any one of the imputed excesses be proved against the trusts, it will be sufficient to invalidate them.—Independent of all excess of the limits of executory devise, the trusts in question are impeachable for *conjoining with executory devise a trust of ACCUMULATION*, so constituted in principle, as to make the *whole income* of property, of every description and in every extent, *unenjoyable* and *unexpendible* for as long a time, as, by our law, entail, thus greatly extended, as I have described, by the artificial stretching of *executory devise*, can make property *unalienable*.—If such a trust of *executory devise and accumulation combined*, shall prevail, it will be a precedent, enabling testators to carry *posthumous accumulation to the full extent of posthumous entail*, thus cunningly protracted through executory devise; and so will authorize putting all kinds of property throughout the kingdom, into a state of *non-user, non-enjoyment, and non-expenditure*, with *certainty* for almost a century and a half; and, even in the present case of beginning experiment, such an effect will most probably be produced to the extent of about sixty or seventy years.—Throughout also this project of posthumous avarice, there is an apparent *tampering* with executory devise and trust of accumulation, to abuse a mere indulgence, and to elude and defraud the real boundaries.—Further, in all this, the scheme of the testator is of the most *unmeritorious kind*; is to abuse testamentary power; is to abuse executory devise; and is to abuse trust; for purposes as dangerous to the public interest, as they are cruel and unnatural towards the family of the testator; for purposes sacrificing public welfare, private duties, and private affections, at the shrine of avaritious vanity.—From an eagerness,



eagerness, also, to keep all succession to his fortune *out of sight*, the testator has fallen into such an obscurity of description of the heirs and succession he meant to appoint, as seemingly to give the opportunity of invalidating the will for *uncertainty* of expression.

EVEN on the ground of *uncertainty*, I should hope, that when that objection shall be thoroughly investigated; and the instances I have generally referred to, of rejecting devises and legacies for that defect, shall be fully considered; there will be found, in a case *not merely unmeritorious*, but *monstrous* in all views of it public as well as private, more than sufficient to justify a court of equity, in the most unqualified condemnation of the trusts in question.

BUT at all events I trust, that at least some of the charges against the trusts, on the ground of *excessive executory devise* and *excessive posthumous accumulation*, are invincible. Upon the mere superficies of executory devise, I can conceive, that *momentarily* the most respectable understanding might not become sufficiently impressed to detect the illegality of the trusts. But when the rule of executory devise is traced to its real origin; when the reasons of indulging executory devise are examined; when the *spirit* of the boundary is sought for; nay, in some respects when the *letter itself* is accurately attended to; and when all this is contrasted, with the *gross tampering* of the late Mr. Thellusson's will to pervert an indulgence for general convenience into a source of public mischief as well as private proscription: then, as I at least feel the subject of this case, there will be found several clear grounds for declaring the trusts a complicated excess of the



boundary of executory devise, and therefore illegal, without so much as entering upon further consideration of the case. But should the case be purged of all the imputed excesses of executory devise, still, exclusive of the objection of the vague and uncertain language used in constructing the beneficial part of the trusts, there would remain against them the monstrous attempt to render *entail of property and the non-enjoyment of its income co-extensive in duration*; and the monstrous attempt, to effectuate this, by making the rule of executory devise subservient to trust of accumulation. So consolidating executory devise and trust of accumulation, I consider as conjoining, what their several natures require to be kept distinct and separate. But the late Mr. Thellusson has thought fit to conjoin them: and if the conjunction be irregular, then on the part of his injured and deceived wife children and grandchildren, I insist, that the just forfeit for that irregularity is a total failure of all effect from the illegal connection, and consequently not merely a failure of the trust of accumulation, but a failure of the subsequent and dependent executory devises. The testator presumptuously consolidates them. If he is irregular as well as presumptuous, and was living, he could not complain of a court of equity, for refusing to separate what he has consolidated, and for so condemning his trust of accumulation and his executory devises to the same disappointment.

THUS, as I see the present case after a long and anxious study, it involves, not only the valuable interests of the family, on whose behalf I have argued, but the credit of the law of England. If it is adjudged against the will, at the same time the Thellusson family shall be relieved from the effect  
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of an unnatural testamentary disposition, the law of England and the courts of Westminster Hall will be safe from all imputation of improperly enduring executory devise and trusts of the same nature. The victory over the will of the late Mr. Thellusson will be gained for English jurisprudence, even in a greater degree than for the Thellusson family. Notwithstanding the immense deprivations to the family of the late Mr. Thellusson from his absorbing and selfish trust of accumulation, they are so far happily situate, as to be able to bear the injury, under which in that event they must submit to suffer. But should your Lordship, in your character of first Judge of English Equity find yourself under an invincible necessity of enforcing such a will, I am at a loss to conceive, how English Law and English Judicature can escape at least the liability to reproach, for being ancillary to posthumous avarice, at the risque of gradually merging all the property of the kingdom in *mere trusteeship*, and of so gradually depriving the *people of England* of all *beneficial enjoyment*.

THEREFORE against a decree confirming the late Mr. Thellusson's proscriptive will,—I deprecate to your Lordship; not merely, on behalf of the interests of the Thellusson family; but on the behalf also of the character of the law of England, which I fear will be highly degraded, if the will of Mr. Thellusson shall be suffered to prevail:—and I deprecate to your Lordship, on behalf of the characters of those venerable Judges; by whom the law of executory devise, and the law of trust of accumulation, were under an exercise of judicial discretion founded for general utility, and whose fame is thereby become responsible for the consequences:—and I

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also



also deprecate to your Lordship, on behalf of the people of England, whose most essential interests may be deeply wounded, should executory devise and trust of accumulation be suffered to degenerate into public mischiefs.

IF your Lordship shall annul the monstrous executory devise and the monstrous trust of accumulation, against a decree for which I thus solemnly deprecate, you will prove, that a great mind is above prejudices, however seducing, and however generally prevalent; and you will, I am persuaded, entitle yourself to the thanks of the people of England.

It so happens also, that the task of annulling the will is far more easy, than that of confirming. The objections, against the will of Mr. Thellusson, are numerous. Any one of them, if well founded, will be sufficient to overturn the will. But if the will is to be sustained, all those numerous objections will be to be disposed of; and this I conceive will at least be a work of immense labour, even to your Lordship's mental powers, great as they are. In this view of the case, then, to overturn the will is the course, not only most honourable, but most easy.

IN hearing the arguments against the will, very much of the valuable time, of your Lordship and the reverend judges your assistants, hath been occupied; and I feel, almost with repentance, that I have been more particularly the cause of so long an intrusion. But perhaps this great cause may now take a short turn in the hearing. It is a cause in many respects very singular. One, amongst other singularities, which I at least impute to it, is, that it is a cause against a last will with *every body* interested to overturn it, with *nobody* really interested to preserve



preserve it from destruction. It is the cause of a will excluding every person now living; and every person who shall be born for many, very many, years to come, probably for about seventy years, possibly for even more than a century. It is a will also against public interest. This may lead to a great abbreviation of the cause in its subsequent progress. Perhaps, in this view of it, the law officers of the crown may not think it a duty to press for a decree in favour of the will. Perhaps, even the counsel of the trustees may not feel themselves bound, to be exceedingly anxious, to establish a will against public good for the sake of some future and distant generation of the name of Thelluffon (*e*).

UPON the whole, I submit to your Lordship, that the trusts in question, in every view of them, ought to be declared invalid and inoperative: and consequently that, as to the grand bulk of Mr. Thelluffon's immense fortune, this court ought to treat the case as an intestacy, and accordingly to declare a resulting trust for the widow and children of the testator; that is; as to the general real estate for the eldest son and heir; and as to the residuary personal estate for the widow and six children of the testator, according to the statute of distribution.

SHOULD such a decree be the result of these causes, your Lordship will rescue the law of England, or rather its judicatures, from the imputation of introducing such an extended posthumous accumulation; as was never endured by the law or judicatures of any other country; and as cannot be endured

(*e*) It is here proper to take notice, that neither the counsel for the trustees in the will, nor the counsel for the crown, acted, as if they considered themselves at liberty to decline making their best exertions. They argued the case for the will, very much at length, with very great and able exertion, and with very great learning.



in this, without public mischiefs of a kind the most threatening and alarming.

Of such a decree, Lord Chancellor Nottingham, were he living, might be induced to speak in terms of the highest eulogium. In justice to your Lordship as the author of such a decree, he might naturally and properly say to you,

“ I WAS the great patron of executory devise and of trusts  
 “ of the same nature. Lord Coke and the judges of his  
 “ time, for the sake of public convenience, permitted entail  
 “ by executory devise both for inheritance and terms of  
 “ years in lands, to the extent of a life in being, and upon  
 “ a principle which included personal chattels. Lord Hale  
 “ and the other judges of my time extended the permission,  
 “ to two or more co-existing persons, where they were named  
 “ to take in a course of settlement, as in the case of succes-  
 “ sive remainders to various existing persons for their lives.  
 “ After Lord Hale’s death a new alarm took place amongst  
 “ some of the judges; least, under shelter of executory devise,  
 “ the law against perpetuity of entail should be gradually  
 “ undermined: and so impressed, they strove to deny to a  
 “ term of years, what was too clearly confirmed to be avowedly  
 “ denied to inheritance; and had they succeeded, probably  
 “ it would have been attempted to repeal executory devise  
 “ for the latter also. But I was successful in resisting this  
 “ attempt against executory devise; and so gradually every  
 “ species of property after my time became in substance  
 “ equally the subject of entail and settlement. I was not,  
 “ however, blind, to the possibility of abuses of entail by  
 “ executory devise and by trusts of the same nature. Fore-  
 “ seeing such abuses, I pledged this Court, that the dis-  
 “ cretion



“ cretion over executory devises and over trusts should be  
“ effectually exerted to prevent public inconvenience. It  
“ was reserved for you, to decide, whether the pledge thus  
“ coming from me should be made good. You have had an  
“ arduous duty to perform ; and the strong prejudices in fa-  
“ vour of a literal adherence to the boundary of executory  
“ devise have encreased a difficulty otherwise sufficiently  
“ great. Many judges of a very high class might have been  
“ very unequal to such a contest with fraud upon executory  
“ devise. But you have shewn yourself fully equal to the  
“ situation. You have unmasked the fraud attempted by  
“ the will of Mr. Thellusson. You have prevented entail by  
“ executory devise, from being artificially and irregularly  
“ extended beyond entail by the ordinary legal mode of  
“ settlement. You have exemplified the true principle of  
“ the boundary of executory devise. You have prevented  
“ trust, from being made an instrument for effecting the  
“ double mischief of excessive entail and excessive accumu-  
“ lation. You have shewn, that the boundary of entail and  
“ the boundary of posthumous accumulation are distinct ;  
“ and that what may be properly allowed for the former  
“ may be intolerable for the latter. You have proclaimed,  
“ that neither executory devise, nor trust, can be made  
“ subservient to plans of stopping both the alienation and  
“ use of English property for almost a century and an half.  
“ You have evinced, that English judicature is too watchful  
“ of posthumous avarice to minister to it's monstrous excesses.  
“ By all this, you have done justice, not only to the cha-  
“ racters of the founders and patrons of executory devise ;  
“ but to the law of England itself ; and to that principle of  
“ public utility, which is the only legitimate father of  
“ executory



“executory devise and trust of the same nature and of their  
“respective boundaries.”

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[In the Appendix, the Reader will find two papers connected with the preceding THREE ARGUMENTS. No. I. of the Appendix is a statement of the case, which is the subject of the Arguments; and though it is part of a paper prepared by the Author of them for the use of the other Counsel against the Will of the late Mr. Thelluffon, before institution of the two Causes, in which the three Arguments were delivered, it doth not materially differ from the case as it appears on the Bills and Answers. No. II. of the Appendix is introduced for the sake of shewing, how far the remarks, in the course of the *Three Arguments*, as to the probable consequences of giving effect to the late Mr. Thelluffon's testamentary trusts of accumulation, may be relied upon.]



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APPENDIX.

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APPENDIX

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# A P P E N D I X.

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## No. I.

EXTRACT *from a CASE and ARGUMENT on the LAST WILL of the late PETER THELLUSSON, ESQUIRE, by the Author of the Three Arguments against that Will now printed;—consisting of the INTRODUCTION and the CASE STATED.*

### INTRODUCTION.

THE last will of the late Mr. Thelluffon presents a very singular subject for the consideration and decision of English judicature. Our courts of justice have often been called upon to resist and counteract schemes for unduly preventing the alienation of property, and for introducing a perpetuity of entail. But the ambition of interdicting all expenditure, even of the income, from an overgrown fortune, till it shall have accumulated into a landed fortune of millions, and of making the devisees of such accumulated wealth uncertain till the very moment the accumulation is appointed to cease, seems to have been in great measure reserved to distinguish the aspiring and ingenious avarice of Mr. Thelluffon: and from the fate of his grand testamentary arrangement for this vain and ostentatious purpose, it will probably be ascertained, whether the policy of the law of England is not as adequate to disappoint monstrous projects of accumulation, as it has hitherto proved to limit the excess of entails, and to obstruct the establishment of perpetuities.



When I was first consulted on the extraordinary trusts, to which Mr. Thelluffon's last will devotes his very immense residuary fortune, I was struck with the novelty of the case in some points of view; and I foresaw the great disadvantage, under which his family would be, in contesting those trusts, from the consequential want of direct precedents to assist judicial decision. It therefore became me to be extremely cautious in forming my opinion. Those of the Thelluffon family, who are deeply interested against the grand trust of accumulation, and who honoured me with their confidence, had a right to expect great anxiety to assist them professionally in a business of such magnitude of value. Exclusive also of the just demands upon me as one of their counsel, I was so disgusted with the testator's unfeeling exclusion of all his children and grand-children, without sparing even issue in the womb at his death, as to feel zealous to extricate his family from the effects of his unnatural project. But then on this very account it was proper, that I should be the more on my guard in expressing my sentiments; lest my prejudices, against the grand residuary bequest, for its extreme harshness, should make me blind to the arguments in favour of its legality, and so betray me into encouraging an ill-founded hope of victory, over a testamentary disposition, which, however odious, might not fall within any principle of judicial condemnation.

However, notwithstanding these checks upon me, I avowed my doubts—whether the trusts, which Mr. Thelluffon's will creates of his residuary estate, that is, of the great bulk of his princely fortune, were not a nullity;—and whether, from this failure of the trusts, his residuary estate, both real and personal, is not in effect devolved upon his family, in the same way, as if he had died intestate.

In thus questioning the legality of the late Mr. Thelluffon's great residuary bequest, I stated various grounds upon which the trusts of it appeared to me attackable. But I endeavoured to be as brief and general in the statement, as was consistent with being intelligible; and with that view I repressed my ardour to subdue an odious precedent of testamentary disposition. Sometimes anxious length of opinion generates ungracious comments instead of thankful acknowledgments. Sometimes, the more zealous a professional person is in his first services, the more unnecessary he is deemed afterwards. There was a time when I would not have listened to such truths. But too frequent experience of their importance at length forces me to be somewhat mindful of them; and under their influence, I was become fearful of erring by being over explicit; and I was prudentially careful to avoid the imputation of doing more than was either expected or wished for.

But



APPENDIX, NO. I.

But though I studied shortness of expression in answering the case upon the will of the late Mr. Thelluffon, there was enough stated, to lead to all or most of the topicks, which influenced my sentiments against the great residuary trust. Therefore I had the satisfaction of knowing, that somewhat like an outline of my impressions was communicated; and that so the immediate object of consulting me was as sufficiently accomplished, as could be expected in the form of opinion from my means of information.

In this state of the business there was an opportunity of ceasing to claim my professional assistance in the business; and I am not unaware, that from the talents and learning of the other counsel consulted, my further services might have been safely dispensed with.

But it was not thought fit so to treat my first efforts against the will in question. On the contrary, those interested to set aside the great residuary trust of the will, and their solicitors, not only in the most handsome terms evinced a desire of continuing confidence in me, but anxiously solicited the fullest expression of my ideas in the form of a written argument.

Accordingly I have adventured upon such an undertaking, under the impression and hope, that my labours in the first instance, however unsuccessful they shall be, may, when the business shall be ripe for discussion in the proper forum, prove in some degree subsidiary to those capable of far superior exertion. If I shall administer useful matter to be worked upon by their higher energies, I shall consider myself as having fulfilled the purpose expected from me.

Thus engaged in this business, I shall proceed to state and argue the case without any further introduction.

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THE CASE STATED.

The case on the last will of the late Mr. Thelluffon, under the impression, that the purpose, of arguing the validity of the trusts created of his residuary estate real and personal, renders it convenient to include some short account of his situation and character, and to give the outline of the whole will, may be thus stated.

The late Mr. Thelluffon was born at Paris in the year 1735; but may be considered legally as born a subject of the republic of Geneva,  
his



his father being at the time Minister from that republic to the court of France. He came over to England about the year 17 , when he was in his      year. He settled in London as a merchant, and was naturalized by Act of Parliament in 17 . He began here with a fortune supposed to be about £.10,000. Many things concurred, to distinguish him as a commercial person, and to insure his acquisition of great wealth. He had an understanding of compass, acuteness, quickness, and discrimination. His knowledge of commerce was deemed extensive and profound. His industry in the application of his talents and information to mercantile affairs was continual. He possessed and exhibited a spirit of enterprize in his undertakings: but it was corrected by a penetrative caution and a solid judgment. His thirst for money was unquenchable; and appeared so to absorb his feelings, as to render them in great measure subservient to the acquisition of it. His œconomy therefore was severe and unceasing. But with all his avarice he did not quite answer the description of one, *qui non possedit divitias, sed divitiis possessus est*: for, though he was for many purposes rather a slave to wealth than the possessor of it; yet neither in his stile of living, nor in the management of his family and domestic concerns, did he usually condescend to that coarse vulgar and ungentlemanly fordidness, which some misers practise. In truth his avarice for the most part was of the higher order, and in some respects assumed a dignified mein. His constitution of body was naturally robust; and he was too temperate to injure it by any excess. The result of all this was a prosperity in the commercial line almost unexampled.

At the time of making his last will, which was in April 1796, the state of his family and fortune was to this effect.

Some time after having settled in England, he married Miss Ann Woodford. This Lady, of whose merits his will with all its faults bears ample testimony, was living. By her he had living three sons and three daughters. The three sons were settled together in partnership as merchants in the house in London, from which their father had recently retired; and were prosecuting the same extensive commerce. All three of the sons had married most respectably with the full approbation of their father. The eldest and second sons had issue; the former three sons and two daughters; the latter two daughters; and both had a prospect of more issue. The third son was but recently married. All three of the sons, a little before the date of Mr. Thellusson's will, were become Members of the British House of Commons; and there was reason to presume, that his pride was not a little gratified at a circumstance remarkable for any father, and much more so for a father of foreign birth and of a foreign family, and



and only become a full subject of Great-Britain by an act of naturalization. Of the three daughters of Mr. Thelluffon, two were of age; and the eldest was married to the Honourable Mr. Augustus Phipps, a younger brother of Lord Mulgrave.

In respect to the fortune of Mr. Thelluffon, it may be sufficient here to mention, that notwithstanding very considerable provisions advanced for his three sons, amounting according to the statement of his will to nearly £.16,000. a piece, and notwithstanding the portion he had advanced to his eldest daughter on her marriage with Lord Mulgrave's brother, the aggregate of Mr. Thelluffon's real and personal estate probably amounted in value to some sum about seven hundred thousand pounds. I say probably: because so it hath been estimated since his death; and no circumstance appears to have occurred to cause any material encrease between the date of his will and the time of his death, which was little more than the interval of a year.

Thus situate in family and fortune, and being above the age of sixty, and in the most perfect health, and at least seeming to be on terms of the most affectionate amity with all the near relatives I have described, the late Mr. Thelluffon made the eccentric last will, which is now in question.

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THE will bears date the second of April 1796.

The first part is chiefly taken up with making provision for his Lady.—For this purpose he first gives to her 300 guineas payable in ten days after his death. He then bequeaths to her all the wines and liquors at his capital messuage at Plaistow near Bromley in Kent, and all the corn, hay and straw, in the buildings and stack-yards, and all the jewels, watches and trinkets, in her possession and custody. These bequests to his wife are followed by a legacy of 300 guineas a-piece, to three gentlemen, who are made trustees throughout the will, namely, his brother-in-law the Reverend Matthew Woodford Archdeacon of Winchester, James Stanley Esquire Barrister at Law, and Emperor John Alexander Woodford Esquire: but this is explained to be an acknowledgment for their trouble.—Next, he gives 25 guineas a-piece for a ring to Mr. Lear and Mr. Handasyde, with whom, after retiring from his general mercantile business, the testator continued to have a sugar concern: but these rings were given conditionally;



ditionally; that is, if, they were in partnership with him at his death.—Then, after giving half a year's wages to all his servants; the testator resumes the consideration of his wife, by devising his capital messuage at Plaistow, with its lands, gardens, and appurtenances; and with the linen, household furniture, glass, china, pictures (except some family pictures afterwards specifically bequeathed) books, horses, cattle, carriages, harness, carts, waggon, ploughs and implements of husbandry, or belonging to his gardens and hot-houses, which should be in or upon the premises at Plaistow, to Messrs. Matthew Woodford, James Stanley and Emperor John Alexander Woodford, their heirs and assigns upon various trusts for Mrs. Thelluffon and other purposes. The first trust is to permit his wife Mrs. Thelluffon to enjoy during such part of her life as she shall continue his widow: and this is mixed with a direction, that she shall have the use of 1,400 ounces of plate, which in a subsequent part of the will are given amongst his three sons upon her death or second marriage, and with a declaration that the provisions for her by this will are to be in bar of dower. But upon her death or marrying again, the will directs the trustees, to sell all the property at Plaistow so devised in trust, and to carry the money from the sale to the account of his residuary personal estate.—Then the will gives directions, for securing out of the dividends of £ 22,000, Bank Stock and by £ 600 a year Long Annuities, a neat yearly income of £ 2,140, for Mrs. Thelluffon during her life.—But this income is made reducible to £ 300 Long Annuities and the interest of £ 5,500 Bank Stock in case of her marrying again.

These provisions for the wife of Mr. Thelluffon, which constitute all the bequests in her favour, except an annuity of 100 livres for her life in the French Funds, are accompanied, with a bequest of £ 22,000. Bank Stock and £ 600. a year Long Annuities, subject to her life income out of those funds, amongst his three sons and his three daughters. It is a complication of bequests in the arrangement. But the substance is, that the sum of £ 4000. a piece is given out of the Bank Stock to his three sons; that the 600. a year Long Annuities and £ 4,500. of the Bank Stock are equally appropriated amongst his three daughters; and that the sum of £ 5,500. residue of the £ 22,000. Bank Stock is made appointable by the will of Mrs. Thelluffon amongst the sons and daughters and their issue, and in default of appointment equally amongst such of them as should survive her and the issue of such as should be dead.

Having thus provided for his wife, and disposed of the property at Plaistow and settled the £ 22,000. Bank Stock and £ 600. a year Long Annuities upon her and the six children, the testator proceeds



to give other legacies to his three sons.—These are £ 7,600. to Mr. Peter Isaac Thelluffon his eldest son, to make the money already advanced to him £ 23,000. with a small annuity on his life in the French Funds: £ 7,600 to Mr. George Woodford Thelluffon the second son, to make up £ 23,000. to him in the same manner, with a small annuity in the French Funds on his life: and £ 7,600. to Mr. Charles Thelluffon the youngest son, to make up £ 23,000. to him, with £ 100. on his life in an Irish Tontine.

These legacies to the three sons are followed by long provisions arranging a settlement of the before-mentioned £ 4,500. Bank Stock and £ 600 a year Long Annuities in three equal proportions upon his three daughters and their issue, and by a legacy of £ 12,000. a piece in trust for the two unmarried daughters, with various restrictions, and limitations to prevent their marriage without consent of his wife and executors, and to secure a settlement of the legacies of £ 12,000. and also in the case of some events to carry over great part of these provisions for the daughters to the great sweeping fund of the testator's residuary personal estate.

Then the will bequeathes £ 100. Irish Tontine to the eldest daughter, and various life annuities in the French funds amongst her and her two sisters; and it appropriates other life annuities in the same funds, for his grandson, the eldest son of Mr. Peter Isaac Thelluffon, and for two nephews-in-law, sons of Colonel Woodford by the Duke of Gordon's sister, the Countess Dowager of Westmoreland.

The testator's next bequest is of his house and warehouses in Philpot-lane, London, where he had long carried on his business as a merchant, and where at the time of his will his three sons were carrying on the same business in partnership. It is a property of considerable value; and he gives it to the three trustees before mentioned, on trust to permit his three sons to carry on their business for six years from his death. If they continue in business to the end of that time, the property is in effect given amongst them absolutely. If they should all quit business before the expiration of six years, the trust is to sell the property, and the money from the sale is added to his residuary personal estate. His anxiety, that his sons should never quit business, is expressed with a pathos almost ludicrously extravagant: for in adverting to such an event within the six years, he adds in a parenthesis "which I most earnestly hope and pray to God will *never* be the case."

From his Philpot-lane property, the testator passes over to the making some arrangement, as to the income of two estates in Montserrat and Grenada, which he and the representatives of a Mr. Col-



part held in partnership, and of which the testator's share was fifteen-sixteenths; and also as to £ 250. Long Annuities belonging to the same partnership.

Having advanced thus far in his dispositions, the testator makes a pause; and so forgets the feelings of a parent, as to introduce a moralizing sneer at the expence of his three sons, and so to prepare them as it were for the shock of the succeeding disinherison of them and their children from the great body of his vast fortune. It is in these words. "The provision, which I have made for my said three sons, and the very great success they have met with, will be sufficient to procure them comfort; and it is my earnest wish and desire, that they will avoid ostentation vanity and pompous shew, as that will be the best fortune they can possess."

This unbecoming insinuation against his three sons is followed with petty legacies of £ 105. a piece for the benefit of his two nephews-in-law, sons of Col. Woodford and Lady Westmoreland, and so fettered by a provision of accumulation, and so contingently carried into the gulph of his residuary trust, as to lose great part of their little value.

There next follow various legacies of rings, particularly rings each of the value of £ 50 to his three daughters-in-law the ladies of his three sons, and to his son-in-law Mr. Augustus Phipps. These are just sufficient to shew, that the testator thought these relatives intitled to some remembrances. Considered also as legacies in that form, they are, it must be confessed, handsome: indeed much more so than could be spared by the sordidness of the vulgar species of avarice.

Then there is a legacy of £ 1000. to his executors in trust for a brother of the testator in Switzerland for his life, and afterwards for some nieces there; but still with an eye to the favourite fund of the testator; for if all the nieces should die in his brother's life time, the legacy is made to sink into the testator's residuary personal estate.

After this sparing remembrance of his foreign relatives, the testator introduces some legacies to his three sons, and his eldest grandson; such as, though nothing in a pecuniary point of view, are yet otherwise not wholly inexpressive of parental amity and family affection. Those to Mr. Peter Isaac Thellusson the eldest son are,—the large picture of the testator's father by Rigaud,—the large picture of the testator's mother by Largillere,—all other his family pictures except what are afterwards mentioned,—his father's bust in marble,—his gold seal with the family arms,—the gold snuff-box; which Lewis the Fifteenth gave to the testator, containing the portrait of his son the Dauphin father of Lewis the Sixteenth,—the silver medal copy of the gold one given to the testator's father by the city of Geneva,—and the silver coffee-pot and  
salver



silver given to him by that city with the Geneva arms upon them. The articles given to the three others are,—a picture of the father of the testator at his seat at Brodsworth to the second son Mr. George Woodford Thelluffon,—a gold watch by Mudge with three seals to Mr. Charles Thelluffon the third son,—and the testator's small gold watch to his eldest grandson John Thelluffon.

But these little mementos of parental affection are immediately followed, with a further preparation for the grand blow the testator meditated against all his family. This second notice of the projected harshness towards them is conveyed through a bequest, which is chiefly of articles at the testator's seat at Brodsworth in Yorkshire, where his principal real estate was situate: for he bequeaths the remainder of his plate, with his books, china, linen, wines, and the remainder of his pictures, and all the furniture at Brodsworth, to be sold, and the money from the sale to be carried to the grand reservoir of his ambitious avarice, his residuary estate; but qualifies the bequest with the significant exception of such part of the things so given, as his trustees should "think necessary to be kept for the purpose of receiving any of them or of his sons who *should chuse to spend a little time there occasionally.*"

Having thus the second time broadly hinted at some extraordinary unkindness towards his family, the testator at length fully discloses his vain and ungenerous purpose in the following manner.

He begins with devising all the manors lands and hereditaments in Yorkshire which he had purchased of Lord Kinnoul and others, and all his manors lands and hereditaments for the purchase of which he had contracted in writing, and all other his real estates whatsoever and wheresoever, to the three trustees already named, so as to vest the legal fee simple in them upon the trusts after mentioned. The devise is thus expressed:

"I give and devise all my manors or lordships messuages lands tenements and hereditaments, situate at Brodsworth Marr and Hampole in the county of York, purchased by me from the Right Hon. the Earl of Kinnoul; and also my other freehold manor messuages lands tenements and hereditaments, purchased by me from William Crowther Thomas Bradford and the widow Duckett, situate near Hampole and in the several parishes Adwick Thorp and Owston near Doncaster in the said county of York: and also the advowson right of patronage and presentation of and to the church of Marr in the said county; and all the messuages or tenements lands hereditaments and premises, for the purchase whereof respectively I have made and entered into any contract or contracts in writing, together with the benefit and advantage of such contract and contracts respectively; and all other my real estate whatsoever and

"where-



“ wherefoever; unto and to the use of the said Matthew Woodford  
 “ James Stanley and Emperor John Alexander Woodford their heirs  
 “ and assigns for ever, upon the trusts and to and for the intents  
 “ and purposes herein after mentioned of and concerning the same.”

It is observable, that this devise of the testator's real estate is expressed without any exception whatever. But without doubt it must be understood to be subject, to the previous specific arrangements of the testator's estate at Plaistow near Bromley and his house in Philpot-lane London, and his plantations in Montserrat and Grenada.

Immediately after the devise of the fee of the real estates, there is the following bequest of all the residue of the testator's personal estate to the same trustees, under a direction to convert the whole into money, and to invest such money in the purchase of freehold lands and hereditaments in fee simple in England, and of copyholds of inheritance there not exceeding the proportion of one-fourth of the whole.

“ And as to for and concerning all the rest residue and remainder  
 “ of my personal estate of whatever kind and condition the same be,  
 “ as well that which I may be possessed of at the time of my de-  
 “ cease, as also such of the said several sums as are in the events and  
 “ on the conditions herein before-mentioned expressed ordered and  
 “ directed to sink into such residuum, I give and bequeath the same  
 “ and every part thereof with the appurtenances, unto the said Matthew  
 “ Woodford James Stanley and Emperor John Alexander Woodford  
 “ their executors administrators and assigns, upon trust and to the  
 “ intent and purpose, that they the said Matthew Woodford, James  
 “ Stanley and Emperor John Alexander Woodford and the survivors  
 “ and survivor of them and the executors administrators and assigns  
 “ of such survivor, do and shall as soon as conveniently may be  
 “ after my decease, lay out and invest the same, converting such  
 “ parts thereof into money as shall not consist of money, and calling  
 “ in such money as shall be placed out on securities, in their or his  
 “ own names or name, in the purchase of freehold lands tenements  
 “ or hereditaments of inheritance in fee simple, or of copyhold  
 “ estates of inheritance in that part of Great Britain called England,  
 “ so that such copyhold estates do not exceed one-fourth in pro-  
 “ portion of the whole of the premises so directed to be purchased  
 “ as aforesaid, but upon the trust and for the intents and purposes  
 “ herein after-mentioned expressed and declared of and concerning  
 “ the same.”

Having thus vested the legal fee of all his Yorkshire manors and estates and his residuary real estate and his residuary personal estate in



in the three trustees, and directed them to invest all his residuary personal estate in the purchase of lands in England, the testator proceeds to unfold his scheme, to be an exclusion of all his existing issue, for the sake of accumulating three fortunes, each of unexampled magnitude, to aggrandize three future and remote male descendants, or in case of there being only one of the given description when the period of accumulation should cease and the time of enjoyment should commence, to concentrate the whole of the immeasurable accumulation in such single individual.

The testator opens this his grand project, with establishing a trust preventive of all expenditure whatever during a number of lives, which, on the most restrictive construction of the language, promise a period of accumulation for sixty years or more, and leave a possibility of its lasting for above a century. This part of the plan is thus expressed.

“ And I declare and direct that the said Matthew Woodford,  
 “ James Stanley and Emperor John Alexander Woodford, their heirs  
 “ and assigns, shall stand and be seized of my said manors or lord-  
 “ ships messuages lands tenements and hereditaments and real estate  
 “ herein before to them devised, and of and in the said freehold  
 “ and copyhold estates herein before by me directed to be purchased  
 “ as aforesaid, upon the trusts and to and for the intents and pur-  
 “ poses herein after-mentioned expressed and declared of and con-  
 “ cerning the same, (that is to say,) upon trust that they the said  
 “ Matthew Woodford James Stanley and Emperor John Alexander  
 “ Woodford, and the survivors and survivor of them, and the heirs  
 “ and assigns of such survivor, do and shall *(from time to time*  
 “ *during the natural lives, of my said sons Peter Isaac Thellusson,*  
 “ *George Woodford Thellusson, and Charles Thellusson; and of*  
 “ *my grandson John Thellusson son of my said son Peter*  
 “ *Isaac Thellusson; and of such other sons as my said son*  
 “ *Peter Isaac Thellusson now has or may have; and of such issue,*  
 “ *as my said grandson John Thellusson may have; and of such issue,*  
 “ *as any other sons of my said son Peter Isaac Thellusson may*  
 “ *have; and of such sons as my said sons George Woodford Thel-*  
 “ *lusson and Charles Thellusson may have; and of such issue, as such*  
 “ *sons may have, AS SHALL BE LIVING AT THE TIME OF MY*  
 “ *DECEASE OR BORN IN DUE TIME AFTERWARDS; and during*  
 “ *the natural lives and life of the survivors and survivor of the*  
 “ *several persons aforesaid) collect and receive the rents and profits*  
 “ *of the manors or lordships messuages lands tenements and here-*  
 “ *ditaments herein before by me devised and so to be purchased as*  
 “ *aforesaid: and do and shall from time to time lay out and invest*  
 “ *the money arising from such rents and profits, in such purchases*  
 “ as



*“ as I have herein before directed to be made with my said personal  
 “ estate: and so from time to time do and shall collect and receive  
 “ and lay out and invest the rents and profits of the manors or lord-  
 “ ships messuages lands tenements and hereditaments herein before  
 “ by me devised and to be purchased as last aforesaid, in the man-  
 “ ner herein before directed with respect to the rents and profits of  
 “ the manors or lordships messuages lands tenements and heredita-  
 “ ments herein before by me devised and to be originally purchased  
 “ as aforesaid.”*

After this ACCUMULATING appropriation of the rents and profits from the testator's general real estate, and the lands to be purchased with his residuary personal estate, there immediately follows a direction to the trustees, from time to time to cut down the timber fit for felling, and to sell such timber, and to apply the money from the sale for the same purpose of purchasing lands: and then the testator empowers the trustees to make leases of the landed property, and to act in the management of it, as if the estates were their own.

Thus having fixed how long the accumulation should continue, and such a manner of conducting it, as most completely excludes the least application of the income from the devised property for any other purpose, the testator proceeds to describe, what persons should primarily enjoy the excessive mass of landed property he aimed to constitute, and what should be the order and manner of succession to them. His object in this respect is, to divide the accumulated landed estates into three equal lots; and to settle one lot on the male descendants of his eldest son, another lot on his second son's male descendants, and the remaining lot on his third son's male descendants; and so to erect three landed fortunes of a magnitude hitherto unknown in England for three distinct branches of the Thelluffon family. His object also is, if there should be a failure of male descendants from one of the sons, to augment with the lot of his branch, the loss of the branches of the two other sons; or if there should be a failure of male descendants from two of the three sons, to consolidate the three lots into one huge mass of landed property exceeding the largest territorial private fortune yet known in Europe. But in the execution of this vain project the testator shews more of cunning than clearness and precision. The cunning appears, from his securing against all possibility of alienating these accumulating expectancies, by making it uncertain who should be the devisees till the very moment the accumulation should cease; and from his attempting to win Judicature and even Parliament into a support of his project, by appropriating the accumulated fortune to lessen the national debt on the remote contingency of an entire failure of male issue of his three sons. But either because his scheme of future entail was



too whimsical to be clearly described; or because he had not a command of our language adequate to convey a full idea of his meaning to those who assisted him in the will professionally; there is such an obscurity, as at least makes it very uncertain, both who was the male descendant of each son intended to take in the first instance, and who on the determination of such male descendant's estate in tail male were intended to take successively as male descendants afterwards.

The direction of the testator, for cesser of the accumulation, and for partition and entail of the accumulated property on the male descendants of his three sons when that time shall arrive, is given to his trustees in the following manner. It begins thus.

" And I do hereby direct that AFTER THE DECEASE OF THE  
 " SURVIVOR OF THE SAID SEVERAL PERSONS, DURING WHOSE  
 " LIVES THE RENTS AND PROFITS *of the manors or lordships*  
 " *messuages lands tenements and hereditaments herein before by*  
 " *me devised and to be purchased as aforesaid* ARE HEREBY DI-  
 " RECTED TO ACCUMULATE *as aforesaid, an equal partition shall*  
 " *be made by my said trustees, or the survivors or survivor of them*  
 " and the trustees to be appointed as hereafter mentioned, *of the*  
 " *manors or lordships messuages lands tenements and hereditaments*  
 " *herein before devised and so to be purchased from time to time*  
 " *as aforesaid, and the whole thereof divided into THREE lots of*  
 " *equal value, or as near thereto as possible.*"

This direction for a division into three lots is immediately followed with an instruction, how to settle the FIRST lot, and for that purpose the will proceeds thus:

" *And that the premises contained in ONE SUCH LOT shall be*  
 " *conveyed to the use of the ELDEST MALE LINEAL DESCENDANT*  
 " *THEN LIVING (and who shall be entitled to the choice of such*  
 " *allotments) of my said son Peter Isaac Thellusson in tail male;*  
 " *with remainder to the SECOND, THIRD, FOURTH, AND ALL AND*  
 " *EVERY OTHER MALE LINEAL DESCENDANT OR DESCENDANTS,*  
 " *THEN LIVING, WHO SHALL BE INCAPABLE OF TAKING AS*  
 " *HEIR IN TAIL MALE OF ANY OF THE PERSONS TO WHOM A*  
 " *PRIOR ESTATE IS HEREBY DIRECTED TO BE LIMITED, OF*  
 " *MY SAID SON PETER ISAAC THELLUSSON SUCCESSIVELY IN*  
 " *TAIL MALE: with remainder in equal moieties, TO THE ELDEST*  
 " *AND EVERY OTHER MALE LINEAL DESCENDANT OR DESCEN-*  
 " *DANTS THEN LIVING OF MY SAID SONS GEORGE WOODFORD*  
 " *THELLUSSON AND CHARLES THELLUSSON, as tenants in com-*  
 " *mon in tail male, in the same manner as herein before directed*  
 " *WITH RESPECT TO THE ELDEST AND EVERY OTHER MALE*  
 " LINEAL



“ LINEAL DESCENDANT AND DESCENDANTS OF MY SAID SON  
 “ PETER ISAAC THELLUSSON; *with cross remainders between or*  
 “ *among such male lineal descendants as aforesaid of my said sons*  
 “ *George Woodford Thellusson and Charles Thellusson in tail male;*  
 “ *or in case there shall be but ONE SUCH MALE LINEAL DESCEN-*  
 “ *DANT, then TO SUCH ONE in tail male; with remainder to the use of*  
 “ *them the said Matthew Woodford James Stanley and Emperor John*  
 “ *Alexander Woodford their heirs and assigns for ever, upon the*  
 “ *trusts and for the intents and purposes herein after-mentioned*  
 “ *expressed and declared of and concerning the same.*”

Having directed this settlement of one of the three lots, in favour primarily of future male descendants of Mr. Peter Isaac Thellusson the *eldest son*, but with limitations over in moieties to the future male descendants of the two younger sons respectively, and with cross remainders; the testator goes on to direct a settlement of the two other lots on a like plan. That is the testator, in the same obscure way, first orders one of the two remaining lots to be entailed on his second son's future male descendants, with limitations over in moieties to his eldest son's and his third son's future male descendants and cross remainders between them; and the third and remaining lot to be in like manner limited to the third son's future male descendants, with remainders over to the future male descendants of the eldest and second sons, and with cross remainder between them also. This further disposition is in the words following:

“ And that the premises included *in one other of such allotments*  
 “ *and which shall compose the same, shall be conveyed to the use of*  
 “ *the ELDEST MALE LINEAL DESCENDANT THEN LIVING (who*  
 “ *shall likewise be intitled to the second choice of such allotments) of*  
 “ *my said son George Woodford Thellusson in tail male; with remain-*  
 “ *ders to the SECOND THIRD FOURTH AND ALL AND EVERY OTHER*  
 “ *MALE LINEAL DESCENDANT OR DESCENDANTS THEN LIVING,*  
 “ *WHO SHALL BE INCAPABLE OF TAKING AS HEIR IN TAIL*  
 “ *MALE OF ANY OF THE PERSONS TO WHOM A PRIOR ESTATE*  
 “ *IS HEREBY DIRECTED TO BE LIMITED OF MY SAID SON*  
 “ *GEORGE WOODFORD THELLUSSON SUCCESSIVELY IN TAIL*  
 “ *MALE; WITH REMAINDERS IN EQUAL MOIETIES TO THE*  
 “ *ELDEST AND EVERY OTHER MALE LINEAL DESCENDANT OR*  
 “ *DECENDANTS THEN LIVING OF MY SAID SONS PETER ISAAC*  
 “ *THELLUSSON AND CHARLES THELLUSSON AS TENANTS IN*  
 “ *COMMON IN TAIL MALE, in the same manner as is herein before*  
 “ *directed with respect to the eldest and every other male lineal*  
 “ *descendant or descendants of my said son George Woodford Thel-*  
 “ *lusson, with cross remainders between or among such male lineal*  
 “ *descen-*



“ descendants as aforesaid of my said sons Peter Isaac Thellusson  
 “ and Charles Thellusson in tail male, or in case there shall be but  
 “ one such male lineal descendant then to such one in tail male;  
 “ with remainder to the use of the said Matthew Woodford James  
 “ Stanley and Emperor John Alexander Woodford their heirs and  
 “ assigns for ever, upon the trusts and to and for the intents and  
 “ purposes herein after-mentioned expressed and declared of and  
 “ concerning the same.”

“ And that the premises included in the remaining lot, which  
 “ shall compose the same, shall be conveyed to the use OF THE  
 “ ELDEST MALE LINEAL DESCENDANT THEN LIVING OF MY  
 “ said son Charles Thellusson in tail male, with remainder to the  
 “ SECOND THIRD FOURTH AND ALL AND EVERY OTHER MALE  
 “ LINEAL DESCENDANT OR DESCENDANTS THEN LIVING, WHO  
 “ SHALL BE INCAPABLE OF TAKING AS HEIR IN TAIL MALE  
 “ OF ANY OF THE PERSONS TO WHOM A PRIOR ESTATE IS  
 “ HEREBY DIRECTED TO BE LIMITED, OF MY SAID SON CHARLES  
 “ THELLUSSON SUCCESSIVELY IN TAIL MALE, with remainders  
 “ in equal moieties to the eldest and every other male LINEAL DE-  
 “ SCENDANT OR DESCENDANTS THEN LIVING OF MY SAID SONS  
 “ PETER ISAAC THELLUSSON AND GEORGE WOODFORD THEL-  
 “ LUSSON, AS TENANTS IN COMMON IN TAIL MALE, in the same  
 “ way as herein before directed with respect to the eldest and every  
 “ other male lineal descendant or descendants as aforesaid of my  
 “ said son Charles Thellusson, with cross remainders between or  
 “ among such male lineal descendants as aforesaid of my said sons  
 “ Peter Isaac Thellusson and George Woodford Thellusson in tail  
 “ male, or in case there shall be but one such male lineal descendant  
 “ then to such one in tail male; with remainder to the use of the  
 “ said Matthew Woodford James Stanley and Emperor John  
 “ Alexander Woodford their heirs and assigns for ever, upon the  
 “ trusts and to and for the intents and purposes herein after-mentioned  
 “ expressed and declared of and concerning the same.”

These dispositions of the three allotments of the landed fortune, into which the testator divides his vast general and residuary estate and the expectant uncountable accumulation from it, are succeeded by a further blow to his children and grandchildren. It is observable, that the entail of each allotment concludes with a remainder in fee upon trusts referred to as declared by a subsequent part of the will. After such pains peremptorily to exclude all his existing issue, and contingently to exclude all future issue, till the long trust of accumulation should expire, there could not be any reason to expect, that the testator would shew any kindness to his family in the further and ultimate disposition. Accordingly even the remote reversionary interest is denied to them; and under the appearances of an extraor-



dinary devotion to the interest of the country, into which the testator was naturalized, he gives the finish to the disinherison of his existing issue of every description, by creating a trust, on determination of his entail on the future male descendants of his three sons, for selling the whole of the accumulated property, and for applying the money from the sale to the use of the SINKING FUND towards paying off the NATIONAL DEBT. The manner of this ostentatious disposition is thus.—First there is the following clause directing the trustees to sell.

“ And I declare and direct, that the said Matthew Woodford, James Stanley and Emperor John Alexander Woodford, their heirs and assigns, shall stand and be seized of the manors or lordships, advowson, right of patronage and presentation, messuages, lands, tenements and hereditaments, and real estate herein before by me devised and so to be purchased as aforesaid, UPON FAILURE OF MALE LINEAL DESCENDANTS of my said sons Peter Isaac Thelluffon, George Woodford Thelluffon and Charles Thelluffon as aforesaid, in trust to make sale and dispose of all the said manors or lordships advowson right of patronage and presentation, messuages, lands tenements and hereditaments and real estate, either together or in parcels, unto any person or persons whomsoever, for the best price or prices in money that can be reasonably had or gotten for the same.”—After this direction to sell the accumulated property, there is a provision authorizing the trustees to give receipts to purchasers.—Then comes a bequest of the money from the sale, ordering it to be paid to the Crown for the use of the SINKING FUND in these words:

“ And I declare and direct, that the said Matthew Woodford James Stanley and Emperor John Alexander Woodford their heirs executors administrators and assigns, do and shall pay the money, to arise and be produced from the sale or sales of my said manors or lordships advowson, right of patronage and presentation, messuages lands tenements and hereditaments and real estate herein before devised and so to be purchased as aforesaid, unto his Majesty his heirs and successors Kings and Queens of England to be applied to the use of the SINKING FUND in such manner as shall be directed by act of Parliament.”

This ultimate destination of the money from sale of the accumulated landed estate to the public use, upon the remote contingency of failure of male lineal descendants of the testator's sons and grandsons, is accompanied with a bequest of rents and profits to the same public purpose in the mean time till sale.

The will next contains power to the trustees to place out the testator's personal estate, and the accumulating monies from it and from the purchased lands, upon security, till convenient purchases



shall be found ; and this power \* is so expressed as seemingly at least *to continue the accumulation* till purchases of land shall actually be made ; and if this be so, it adds an uncertain protraction of the accumulation and consequently of all enjoyment under the executory devises or trusts, beyond the various lives selected to postpone the commencement of them.

After this come the usual provisions for indemnity of the trustees ; with power for the trustees for the time being to appoint new trustees, if the three named by the testator, or any of them, should decline to act or die before completion of the trusts of the will.

Then the will gives a direction as to the devised advowson and as to any advowsons which should be purchased, appointing, that when the livings should become void the trustees should present to them, as his three sons in rotation and after them their respective *eldest male lineal descendants* should nominate.

The next provision of the will is a very anxious one, for confining the enjoyment of the accumulated fortune to the name of THELLUSSON. To secure this primary object of his ambitious project of erecting three huge landed fortunes, the testator not only

\* The clause is in the following words.

“ And whereas my said trustees may not be able immediately to find a convenient purchase or convenient purchases, wherein to lay out my said personal estate ; and the money, which shall arise from time to time by the rents and profits of any lands to be purchased as aforesaid or by the sale of timber from such estates, may not, as the same shall from time to time, accrue, amount to a sufficient sum to make proper purchases : Now I do hereby authorise and empower my said trustees and the survivors and survivor of them his executors administrators and assigns, in the mean time and until a convenient purchase or convenient purchases can be made, to permit such part of my said personal estate as is now invested in the Funds or consists of securities for money to remain in such Funds or upon such securities ; and to invest or place out the money to arise from such part of my said personal estate as shall not at my decease consist of money and from the rents and profits of the lands tenements and hereditaments to be purchased pursuant to the directions of this my will or from the sale of timber upon such estates, in any of the public Stocks or Funds or on any Government or real security or securities ; and from time to time to sell all or any of the Stocks or Funds wherein any of the said trust money is or may be invested ; and to call in all or any part of the said trust monies, which is or may be placed out on any security or securities, and again to invest the money to arise from such sale or sales and to be called in as aforesaid, in any other of the public Stocks or Funds or upon any other Government or real securities, when and so often as my said trustees or the survivors or survivor of them his heirs executors or administrators shall think proper, UNTIL A CONVENIENT PURCHASE OR CONVENIENT PURCHASES CAN BE FOUND OR UNTIL A SUFFICIENT SUM OF MONEY SHALL BE ACCUMULATED TO MAKE A PROPER PURCHASE OR PROPER PURCHASES : And I do hereby declare, that THE INTEREST DIVIDENDS AND ANNUAL PRODUCE OF THE SAID STOCKS FUNDS AND SECURITIES SHALL ACCUMULATE, IN THE SAME MANNER, AND FOR THE SAME PURPOSES AS THE RENTS AND PROFITS OF THE LANDS TO BE PURCHASED AS AFORESAID ARE HEREIN BEFORE DIRECTED TO ACCUMULATE.”



requires, that all persons, becoming intitled to the accumulated property or any share of it, should at all times afterwards use the SURNAME of THELLUSSON ONLY; but, in default of their so doing, directs the trustees to sell the estates, and to pay the money from the sale of them to the King to the use of the SINKING FUND.

Having thus nearly concluded his provisions for sacrificing the most valuable interests of his children and grandchildren at the altar of vanity, the testator, as if doubtful, whether the monstrosity of his unfeeling disinherison of his existing family might not tempt Parliament to rescind the chief disposition of his vast fortune, solemnly adds a kind of earnest supplication to the legislature not to interpose. His words are, "As I have earned the fortune, which I now possess, with industry and honesty, *I trust and hope that the LEGISLATURE will not in any manner alter my will*, or the limitations thereby created, but permit my property to go in the manner in which I hereby dispose of it."

After this solemn invocation of Parliament not to disturb his will, the testator directs the rent of his house in Philpot-lane, till the end of the six years after which under a prior part of the will his three sons, if they continued together in business, were to have it, to be carried to the great fund of his residuary estate; and in favour of the same fund, he revokes the before-mentioned legacies of £ 12,000. to his two younger daughters, if they should marry in his life time.

Here also, in order still further to guard against all deduction from the grand fund of his residuary estate, and for that purpose to go the utmost length in excluding his heirs at law, whoever they might be, from all possible benefit in that character, the testator even attempts to devise away his future purchases of land. He had already included in his favourite residuary fund the lands which he had contracted to buy. But his acuteness led him to foresee what really happened, namely, that after his will he might contract for other purchases. And as it may be presumed, being informed, that all such contracts would intitle his heir to have them completed for his benefit out of the personal estate of the testator, he aims to exclude his heir, whoever he should be, even from such a casualty. With that view the testator inserts the following clause:

"In case I shall in my life time enter into any contracts for the purchase of any lands tenements or hereditaments, and I shall happen to die before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death; and  
"that



“ that the purchase monies for such respective estates and premises  
 “ shall be paid by them, by with and out of my personal estate and  
 “ effects; and that the deeds and conveyances thereto respectively  
 “ shall be made to them their heirs and assigns; and that they and  
 “ every of them shall stand remain and be seized and possessed of all  
 “ and singular the premises so to be conveyed, upon under and sub-  
 “ ject to such and the same uses trusts limitations provisoes and con-  
 “ ditions, as are in and by this my will created of and concerning  
 “ the estates hereby directed to be purchased by and with the afore-  
 “ said residuum of my estates and effects in the manner herein before-  
 “ mentioned.”

With this last provision, for thus prospectively absorbing even his future purchases into the mass of the fund of accumulation, the testator hastens to the conclusion of his will: for the small remainder of it is confined, to substituting Mr. George Hibbert the merchant as a trustee with a legacy of 300 guineas; in case of the death in the testator's life time of either of the three trustees Mr. Matthew Woodford Mr. Stanley and Mr. Emperor John Alexander Woodford, to appointing the three latter gentlemen and his wife Mrs. Thelluffon his executors and executrix, and to revoking all his former wills.

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SUCH is the *unnatural* last will of the late Mr. Thelluffon; and such are the proud and vain trusts, for the sake of which he has thought fit to devote the grand mass of his vast fortune, in breach of the ties of natural affection, and in defiance of the powerful claims of his numerous existing family.

The object of the present consideration of his will, being singly to argue and controvert the validity of the trusts it creates of his general real property and of his residuary personal estate, it may seem, as if a shorter and more limited statement might have sufficed; and as if all notice of any parts of the will, beyond the grand disposition now meant to be controverted, might have been spared. But there are points of view, in which, neither can the objections, against the aggrandizing trust of accumulation, and against the trusts appointed to take effect when that is permitted by the testator to cease, be understood in their full force; nor can the demands upon judicature to condemn all those trusts be pressed in their full extent; without occasionally adverting to the bearings of the will and its dependencies and connections in other respects. At least this is my feeling of the case. Therefore I have undergone the labour of travelling over every part of the will; and I have so stated and explained its various arrangements, as to give the largest possible scope for remark and the widest range for argument.

With



With respect to the facts subsequent to the will, they lie in a narrow compass, being only to the following effect.

Some short time after the making of the will, there was a great change in the late Mr. Thelluffon's constitution; and from being seemingly in the best state of health and likely to live to a very extended age, he fell into a decay; and the result was his death the <sup>21<sup>st</sup> of July</sup> ~~second~~ of last <sup>July</sup> ~~April~~\*, which was about a year and four months after the date of his will, leaving Mrs. Thelluffon his widow, Mr. Peter Isaac Thelluffon his eldest son and heir, and him and his younger brothers Mr. George Woodford Thelluffon and Mr. Charles Thelluffon and their three sisters Mrs. Phipps, Miss Maria Thelluffon, and Miss Augusta Charlotte Thelluffon, his six children and only next of kin.

At the time of his death, the state of his family was nearly the same as when his will was executed. The difference was, that about five months before his decease the Lady of his son Mr. Charles Thelluffon was brought to bed of a son who is still living; and that the Lady of Mr. Peter Isaac Thelluffon the testator's eldest son was pregnant, the result of which pregnancy is not yet ascertained†. Including therefore Mrs. Thelluffon the testator's widow who is still living, and the grandson so born between the testator's will and his decease, and the child or children with which his eldest son's Lady was and still is pregnant, the testator's family stood thus. It consisted of his widow, three sons all married, one married daughter, two daughters unmarried, four grandsons, four grand-daughters, and one grand-child or more or grand-children *en ventre sa mere*; and that is the present state of the family concerning which the table annexed to the present case and argument will give some other explanations more especially as to the ages of the children and grand-children.

As to the testator's fortune at his death, it appears from a statement, which has been since made, that, exclusive of some plantation property in Grenada and Montserrat, his real estate consisted of the manor of Broadsworth and other manors and freehold estates of inheritance in Yorkshire, of the value of about £ 4000 a year, and computed with the furniture of Broadsworth House to have cost £ 140,000.—an house and estate at Plaistow, which including furniture is valued at £ 25,000.—and his freehold house and warehouse in Philpot-lane, London, valued at £ 10,000. more. According also to the same statement, the testator's personal fortune consisted of three per cent Stock, which including £ 113,388:9:10. three per cent Imperial Annuities amounted to £ 396,458:8:7. in

\* <sup>July</sup> April 1797.

† She was, soon after the writing of the case and arguments from which this extract is made, brought to bed of twins, namely, two sons.



three per cents—£ 21,000. Bank Stock—£ 14,125. India Stock—£ 36,005 : 11 : 1. four per cents—£ 2,500. in South-Sea Stock—£ 3000 five per cents Loyalty Loan—£ 1500. Irish five per cents—£ 712 Irish Annuity—£ 900 Long Annuity—to the value of £ 2,500. in Hudson's Bay Stock—£ 49000. payable by instalments and secured by the Bond of a firm of undoubted credit—various other debts valued at £ 56,000.—£ 24,000. in bills on the East-India Company—and £ 5,500. cash at his banker's.

Put together the testator's property real and personal has been estimated at the vast sum of £ 721,000. Even, notwithstanding the present low state of the Public Funds, the great bulk of the fortune,—that, which his will cruelly wrests from his existing family, and appropriates as a sacrifice to pride and to gratify vanity,—that, which the will constitutes as a fund for accumulation, till all his sons and existing grandsons shall have ceased to exist,—is thought to be equal to about £ 600,000. in value.

## No. II.

*Copy of Mr. MORGAN'S Calculation of the Accumulation under the Trusts of the late Mr. THELLUSSON'S Will.*

FROM the annexed clause of of Mr. Thelluffon's will it is obvious, that the final distribution of his property cannot be determined before the extinction of the nine lives of his male descendants now aged 37, 33, 29, 13, 6, 5, 1, 1, and 2 years; and consequently that the same must be suffered to accumulate during the whole continuance of a term, which shall be equal to the duration of the last survivor of those lives.

From the most correct tables of the probabilities of human life, it appears to be *more* than an equal chance, that one or other of nine such lives will continue in existence to the full term of 70 years; and therefore that it is *more* than an equal chance, that Mr. Thelluffon's property will be suffered to accumulate to the end of this term. Assuming, however, this period for the whole time in which the property is to accumulate, it will follow, if the money being improved at five per cent, that each £ 100,000. of which Mr. Thelluffon died possessed, will, when it comes to be finally disposed of amount to £ 3,042,642. so that if he died possessed of £ 600,000. it will amount to £ 18,255,852; if of £ 650,000. it will amount to £ 19,777,173; and if of £ 700,000. it will amount to £ 21,298,494. At present, indeed, money is capable of being improved at a much higher



higher interest than five per cent; and were it to continue at the same rate, as it is now, the accumulation would be *twice* as much as I have stated it. But it is not probable, that for so long a period circumstances will remain so favourable to the improvement of property: and therefore it would be improper to compute on such principles. It must however be observed, that the preceding calculations, by limiting their continuance to 70 years, are founded on the supposition, that all the lives will *certainly* become extinct in that period; although it is *more* than an equal chance, that the contrary will prove so. Were we allowed to argue from a *possible*, and not from a probable event, the term might be extended to the utmost limit of human life, which, as the two youngest children are only one year old, would equal 95 years. During such a period, each £ 100,000. improved at five per cent, would amount to more than ten millions, and at the present rate of interest to more than 25 millions. But this, though a *possible*, is an *extreme* case, and therefore not to be adopted. Nevertheless, it cannot be denied, that there is an essential difference between a *possible* and the *probable* event, however remote that probability may be; and in consequence that it cannot be unfair to extend the term of the accumulation rather further than that, for the continuance of which the probabilities are more than equal, considering the possibility of a minor being alive at the death of the last survivor, which of course would postpone the final distribution a few years; and as the chances are nearly equal, that the last survivor does not die before the end of 75 years, I do not think that the term of this accumulation ought to be taken much if at all below 80 years; during which period the property, if £ 600,000. will amount at five per cent, to £ 29,736,865; if £ 650,000. it will amount to £ 32,214,937; and if £ 700,000. it will amount to £ 34,693,009. Should it however be thought more reasonable to limit the accumulation to 75 years, these several sums will in that case amount even to £ 23,299,611. £ 25,241,245. and £ 27,182,880. respectively; which are indeed sufficiently immense, but perhaps considerably inferior to the sum, to which they will hereafter be found to have accumulated, as well from the improvement of money at a higher rate, as from the lengthened duration of the last survivor's existence.

November 30, 1798.

WILL. MORGAN.  
Equitable Assurance Office.





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